UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

STEVE WILDMAN, et al., Plaintiffs, VS. AMERICAN CENTURY SERVICES, LLC, et al., Defendants.	Case No. 4:16-CV-00737-DGK September 18, 2018 Kansas City, Missouri

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TRANSCRIPT OF BENCH TRIAL
BEFORE GREG KAYS
UNITED STATES CHIEF DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript produced by computer.

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I N D E X

E X H I B I T S

(Begin proceedings in open court at 9:05 a.m.)

THE COURT: All right. Mr. Specht, sir.

MR. SPECHT: Yes, Your Honor. There's just one issue that hopefully we can get through quickly I wanted to raise. And the reason I'm raising it now is because I think it's going to affect the testimony of this witness and also the next witness, so maybe we can just deal with it in one fell swoop.

THE COURT: What's the name of the next witness, by the way?

MR. SPECHT: Dr. Strombom.

THE COURT: Strombom, okay.

MR. SPECHT: And it relates to an objection I raised yesterday in terms of the use of the demonstratives and sort of leading the witnesses through the testimony --

THE COURT: Sure.

MR. SPECHT: -- with the demonstratives. I just want to make sure the nature of the objection is clear. And then if we -- we need to, we just make it a continuing objection.

THE COURT: Sure.

MR. SPECHT: But the issue we have is that the demonstratives are really just sort of PowerPoint slides with text on them that is summarizing the expert reports.

THE COURT: So how different is this than your use

of demonstratives with your experts?

MR. SPECHT: Well, there's some differences -- and I think also the way that the defendants are using some of the demonstratives, which are charts and graphs and images that I think of as traditional demonstratives that are illustrating things versus the slides that are just pure text that are restating what's in the reports.

We had -- we had originally proposed putting all the reports in evidence, and the Court didn't want to go there, and the defendants didn't want to go there. And that's fine. But we think it's not fair that they're just taking the reports, putting them into slides, putting them on the screen, and then having their experts sort of read the answers to the questions off the screen.

THE COURT: And the second part of that, Mr. Specht, is you haven't been objecting to their admission, have you?

MR. SPECHT: They haven't been offered for admission.

THE COURT: Okay.

MR. SPECHT: Only the --

THE COURT: None of them have been offered for admission? Okay.

MR. SPECHT: The charts and those things have been, and those are fine. We're fine with those.

THE COURT: Okay.

MR. SPECHT: It's really just the slides that are just text, bullet points from the reports that we have an issue with. I don't --

THE COURT: Yeah. I'll probably -- I'm going to give you the answer I think I gave the defendants when they fussed about this. This is to assist the trier of fact, the judge, in understanding and appreciating the testimony of the expert witness because this is hypertechnical information. And I note your objection, and it can be a continuing objection, but I intend to allow this to proceed in the same fashion it is.

MR. SPECHT: And I appreciate that, Your Honor.

THE COURT: In fact, I told Mr. Fleckner -- I told him to keep up the good work because I need all the help I can get, right? And these are very helpful. And I don't think that it will assist the Court if we were not allowed to do such a thing so -- thank you.

MR. SPECHT: And we'll make that a continuing objection --

THE COURT: Sure.

MR. SPECHT: -- for this witness and for Dr. Strombom.

THE COURT: Sure. Yes, sir.

MR. SPECHT: Thank you, Your Honor.

THE COURT: All right. Mr. Fleckner. Oh, let me

start with Ms. Mann. Ms. Mann, welcome back.

THE WITNESS: Thank you.

THE COURT: Have you been eating Kansas City barbecue since you've been here?

THE WITNESS: Yes, I have.

THE COURT: Good for you. Good for you.

THE WITNESS: And lots of other delicious Kansas City food too, I might add.

THE COURT: Very good. Very good. I'll remind you you're still under oath. And would you please begin by speaking your full name and spelling your last name again for our record?

THE WITNESS: Sure. Kathleen Mary Mann, M-A-N-N.

THE COURT: Thank you, Ms. Mann -- or Dr. Mann.

Please proceed.

KATHLEEN MARY MANN, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION (continued)

BY MR. FLECKNER:

Q. Good morning, Ms. Mann.

A. Good morning.

Q. I just want to conclude your direct testimony on a few discrete issues. First, I'd like to talk about the use of passive investments or index funds. Did you see any evidence in the record that you reviewed that the Retirement Committee considered adding passive investment options to the Plan?

A. Yes.
Q. Did you see whether -- yeah.
A. Yes.
Q. Did you see whether they did that?
A. Yes.
Q. Okay. And what did you observe?
A. I observed that seeing the Hewitt report, the Committee scheduled an additional meeting to discuss the output of the Hewitt suggestions and considerations. I saw that the Committee reviewed and discussed the notion of passive versus active in the next regular Committee meeting. I saw that there was an index fund in the -- in the lineup through 2013. And so then the Committee ultimately decided to add a slate of index funds in 2016.
Q. Okay. And we -- did you find that consideration of passive investments to be appropriate from your perspective?
A. Yes.
Q. And can you elaborate in how you view that compared to other committees?
A. So like any good retirement committee who engages the use of a consultant, the Committee wanted to take a look at -- and, in my opinion, reading the materials -- discuss and chew on and consider the output from that report. Like also any good committee, one can consider these ideas but doesn't have to incorporate each and every one of them, but to really

deliberate about them and determine if and which were -- would be appropriate to incorporate into the Plan. So I saw the Committee do that in a deliberative way.
Q. Okay. There's been some suggestion earlier in the trial that perhaps the Committee should have investigated specific passive funds to be utilized for the Plan as a result of the Hewitt report. Would you agree that -- that the appropriate exercise of the Committee's consideration would include a consideration of specific passive funds to use?
A. Well, I saw in the report from Hewitt that there were specific passive suggestions that were made. And I suppose a committee could discuss specific passive asset classes, but I don't think it necessary to -- to discuss or review in order to be deliberative about this to have gone into the detail of looking at each and every passive manager strategy.
Q. Thank you. I'd like to turn now to stable value. We've also heard a great deal in this trial about stable value funds. And maybe to set the stage a little bit, there's been some testimony about liquidity constraints that are imposed in stable value funds as a result of the insurance wrapper. Maybe just to level set, can you just describe what you've experienced in the market about that?
A. Sure. One of the DC plans with which I worked had a stable value fund in its -- in its lineup when it came under my -- into my team and the work that I needed to do. And this

was in 2008. And, of course, the global financial crisis was hot and heavy. Equity markets were declining. Bond markets were declining. U.S. treasuries and gold were the only real things that rallied that year in 2008. In 2009, plans with stable value funds began to experience difficulty in getting wrap coverage. And so just -- perhaps as a quick reminder, since the stable value fund --

MR. SPECHT: Your Honor, I apologize for interrupting, but I don't think any of this is in her report. So I object to this line of testimony.

MR. FLECKNER: In her report at paragraphs 128 through 131, she explains why she believed it was prudent to have considered or not considered stable value as plaintiffs have alleged. This is just background to get us to that opinion.

MR. SPECHT: It's a whole lot of background, Your Honor.

THE COURT: Okay. Here's the deal. I'll look at 128 and 131. But if you're wrong, you're going to lose some credibility here, Mr. Specht.

MR. SPECHT: I haven't had a chance to --

THE COURT: Because I'll chase whatever rabbit you want me to chase, but I'm only going to chase it one time.

MR. SPECHT: I haven't had a chance to look at the paragraphs that he just cited, but --

THE COURT: Why don't you look at it real quick --

MR. SPECHT: -- I'll look.

THE COURT: -- because this is going to be -- this is going to be a long cross-examination.

MR. FLECKNER: And for the record, 128 through 131.

THE COURT: Thank you.

MR. FLECKNER: So 128, 129, 130 and 131, Your Honor.

MR. SPECHT: So I agree that there's a discussion in there about stable value, but the matters that the witness was just talking about, I don't see any of that in there.

THE COURT: Well, overruled. Please proceed.

Q. Okay. Maybe if you can briefly explain this background so that we can go to your report.

A. I think it was noted in earlier testimony that a stable value fund is basically bond funds that are wrapped with an insurance wrapper to maintain the net asset value between -- between a range.

So during 2009, when stable value -- plan committees were dealing with -- or portfolio managers were dealing with the difficulty in getting wrap coverage. There was a lot of concern about stable value liquidity, among other things. In addition, there are some specific limitations with stable value funds, such as the equity wash and the inability for participants to leave the stable value fund and come back to it or to leave the stable value fund and go to what is often

called a competing fund as well.
Q. Okay. And did you form an opinion in this case as to whether you believed it was reasonable for the Plan Committee to have decided not to include a stable value fund during the class period here?
A. Yes, I did.
Q. And what was that opinion?
A. I thought it was a reasonable decision not to include a stable value fund because the Committee already had in place money market funds and short-term bond fund that participants could use to gain the lowest risk -- lower risk investment in their Plan options.
I also considered that there are other plans that use stable value funds, and that's perfectly fine if they put their stable value fund into their plan prudently. And I've worked with plans that have done that. I did not see it as an issue that this particular Retirement Committee did not include stable value fund in their plan.
Q. Okay. And that opinion is based both on your review of the record and your personal experience that you just described, correct?
A. Yes, it is.
Q. I'd like to turn now -- you mentioned a little bit about the Hewitt report. We're not going to bring up DX [sic] 10. But you've had a chance, I take it, to look at the Hewitt

report, correct?
A. Yes, I have.
Q. Okay. And I think you just testified a moment ago about the consideration that you observed the Committee taking in response to the Hewitt report. Did you believe that their consideration of the Hewitt report's considerations was appropriate?
A. Yes.
Q. And do you believe it was consistent with what you observe in the industry of other committees you've worked with?
A. Yes. When committees receive a report from a consultant, their consultant that they engaged, and they go through it and -- and look at the considerations, I think that is consistent and exactly what a retirement committee should be doing to be deliberative in their process.
Q. So in your experience, would it be appropriate for a committee to reflexively just adopt whatever a consultant puts in a deck to them?
A. Absolutely not.
Q. Why not?
A. Well, sort of like going to Macy's and having the salesperson say, hey, that dress looks really great on you. I, of course -- you know, and I think we heard from Ms. VanWagoner that consultants will often try to expand the potential set of services that they can deliver to a client.

It's typical. It's common in the industry. However, the Committee did look at the considerations and did look at those but is under no obligation to adopt each and every one of the thoughts and ideas that come from such consultant.

Q. Okay. Thank you. And just to wrap up, Ms. Mann, you observed the record. You've heard some of the testimony. Do you believe that American Century and the Committee created a successful 401(k) plan for their participants?

A. I absolutely do.

Q. Okay. Let's pull up, Chris, DX 861. And this is taken from your report, correct?

A. Yes, it is.

Q. Okay. And can you describe to the Court what is being depicted on DX 861?

A. So this is a year-by-year view of the average plan balances in the American Century Plan. So it's the assets divided by the number of participants in the Plan. And it shows that the balances here are between 183 and two hundred -- nearly $300,000, $296,000, relative to let's call it less than half of that for the average DC plan value.

So this is a very successful measure of participants using the Plan, saving for their retirement. And it should be one of the check marks for the Committee to say we're doing a successful job.

THE COURT: Where did you find your plan average at?

THE WITNESS: This data was available through the 5500 reports, the form 5500s that the plan files. And I think the broader plan data was from BrightScope.

THE COURT: BrightScope?

THE WITNESS: Yes.

THE COURT: Thank you.

MR. FLECKNER: We move to admit DX 861.

THE COURT: Any objection to --

MR. SPECHT: No.

THE COURT: And, Mr. Specht, this wasn't the kind of thing you were objecting to at all.

MR. SPECHT: This, Your Honor, I would view as a perfectly appropriate demonstrative --

THE COURT: Okay.

MR. SPECHT: -- unlike the text only demonstratives. And with this one, there's no objection.

THE COURT: Thank you.

MR. FLECKNER: So is it admitted, Your Honor?

THE COURT: It is admitted

(Defendants' Exhibit 861 admitted in evidence.)

MR. FLECKNER: Thank you, Your Honor. And we've not been moving the admission of the text only that Mr. Specht mentioned.

Q. So, again, can you tell us, Ms. Mann, to be clear why do you believe DX 861 demonstrates whether this plan has been

successful?

A. Well, this Committee put together a Plan lineup that was incredibly diverse. I think Hewitt says that as well in their review of the American Century Plan -- with a variety of investment options from which the participants can choose to save for their retirement. When Committee member -- when Plan participants are using the Plan and investing in the Plan, they are doing really exactly what they are incented and we all hope people will do to save for their retirement. So this is considered a very successful plan. And the Committee's work -- this is a contribution or a proof statement of some of the Committee's work that the participants were utilizing the Plan and utilizing the fund options.

MR. FLECKNER: Okay. Thank you very much, Ms. Mann. Those are all the questions I have subject to any redirect.

THE COURT: All right. Mr. Specht, please proceed, sir.

CROSS-EXAMINATION

BY MR. SPECHT:

Q. Good morning, ma'am. I'm going to ask you a series of questions this morning. And for the most part, I'm focusing on the period of time prior to 2016 when the Vanguard funds were added. Does that make sense?

A. Sure.

Q. And I think most of your report kind of focuses on that

time period as well; is that fair?

A. Yes.

Q. So when we're talking about that period of time, you would agree that nothing in the record shows that the Retirement Committee ever discussed the basis for considering only American Century funds, correct?

A. Would you repeat that question, please?

Q. Sure. Nothing in the record shows that the Retirement Committee ever discussed the basis for considering only American Century funds, correct?

A. Correct.

Q. And I think at this point, we've probably proven beyond a reasonable doubt that the Committee never considered a specific nonproprietary fund to add to the Plan during this time period, right?

MR. FLECKNER: Objection. I don't know that she can testify what the trial record has shown by a preponderance of the evidence or --

THE COURT: Well, is there any -- I think --

MR. SPECHT: I can rephrase.

THE COURT: -- anything -- help us, Mr. Specht.

MR. SPECHT: Sure, sure.

Q. You'd agree that it's clear from the evidence in this case that the Committee never considered a specific --

THE COURT: The objection is the same. How about do

you agree based on what you reviewed of the minutes that the Committee didn't consider a specific nonproprietary fund?

MR. SPECHT: That's a much better question, Judge. Thank you.

THE COURT: Thank you.

A. I would say that's correct. However, it wasn't necessary, in my opinion, for the Committee to do so. In its Investment Policy Statement, there is a commentary that says American Century intends to utilize in-house proprietary strategies where they meet the requirements. And this Committee -- I think just using one thought about whether they considered one item or not is not enough to determine how prudent or deliberative a committee is. This is why this project, to me, was like a big puzzle, and you have to investigate all of the processes and a range of decisions that the Committee was making.

Q. And given the fact that the Committee never considered adding a nonproprietary fund, we know that they could not have analyzed whether a nonproprietary fund was in the participants' best interest, correct?

A. Would you say that again? It sounds like two questions in there to me.

Q. Well, I think we've established that they never considered adding a nonproprietary fund to the Plan.

THE COURT: Well, I think you established there was

not a discussion in the minutes about a nonproprietary fund. And other witnesses have testified the minutes are not transcriptions but just highlight decisions made in this. So the first part of your question, I don't think you have established that. I don't think the evidence has established that yet. But -- so why don't you ask a -- I agree with the witness. Ask a different question.

Q. Did you see any evidence in the record, not just the minutes, but depositions, the other documents, the emails, everything -- everything that you looked at, did you see any evidence there that the Committee ever considered adding a specific nonproprietary fund before 2016 when the Vanguard funds were added?

A. I did not see evidence of adding a specific nonproprietary fund. However, what I would say is the Committee did compare the returns of other funds through the performance reports, in the benchmarking report, and through the Schwab performance reports as well. So there was awareness, because the Committee was deliberating the peer universes for performance as well as considering the range of fees as well. And the Committee was staffed with senior executives who were very familiar with the marketplace and what other options were out there and available. And I think the most important part to me is the Plan states its intention in the Investment Policy Statement to utilize in-house funds. So I didn't see any need

for them to do otherwise.

Q. So given that they didn't, in your review of the evidence, ever consider adding a specific nonproprietary fund to the Plan, you would agree that they couldn't have analyzed whether moving to a nonproprietary fund was in the participants' best interest, correct?

A. No, I don't agree with that.

Q. Because of the peer groups you're talking about?

A. Well, I think the way you're -- could you just repeat the way so that -- I just need to listen to that and the parts.

Q. Yeah. Given your conclusion from reviewing the evidence in the case that the Committee never considered adding a specific nonproprietary fund to the Plan --

A. I'm sorry to interrupt. I don't think I said I know they never considered it. What I said is I didn't see it in the record.

THE COURT: Sustained. Yeah.

A. So if you wouldn't mind --

THE COURT: Hey, Mr. Specht, you got -- you -- I'm watching this, and you're kind of -- she stops you and you -- you loop back and kind of ask the same thing that she's objecting to. So you got to help me with this, Mr. Specht, because I want you to be able to complete your cross-examination.

MR. SPECHT: I understand.

THE COURT: I'm pulling for you, but I'm telling you --

MR. SPECHT: I appreciate it.

THE COURT: -- we're going to shut this baby down here pretty quickly.

MR. SPECHT: I appreciate that, Judge. Why don't I move on and --

THE COURT: All right. That would be great.

MR. SPECHT: -- maybe we'll come back to it or maybe not.

THE COURT: Please. Yeah. We're doing this thing here again, right (indicating)?

MR. SPECHT: I hear you.

THE COURT: Okay.

Q. You would agree that there was a significant financial benefit to American Century, the mutual fund company, that arose out of having the roughly 500 million in assets from this Plan invested in American Century funds, wouldn't you?

MR. FLECKNER: Objection.

THE COURT: Why?

MR. FLECKNER: It's beyond the scope. There's been no evidence of financial benefits in the --

THE COURT: I think I'm going to allow that question. Yeah.

A. So if you think that a plan of approximately $500 million

in a -- an asset manager with, I don't know, depending on when we talk about it, $150 billion in assets, so what is that, half of 1 percent of assets is -- is the key driver of the future fortunes of that organization, I would not -- absolutely would not agree with that.

Did American Century receive revenue? Sure. From having investments strategies there? Sure. Was it a large amount as a percentage of their assets or their business? Absolutely not.

Q. So I'm not asking you if it was a key driver or anything like that. I just want to see if you agree with me that having this $500 million worth of investments in American Century funds provides a financial benefit to the mutual fund company. Do you agree with that?

A. Yes.

Q. For the assignment that you were given in this case, you were not asked to provide any opinions related to any sort of conflict of interest, right?

A. Correct.

Q. Karla, can you pull up DX 863?

I want to talk a little bit about your professional background. What I was going to put up was Exhibit 863, which is the demonstrative that you and the defense have prepared that sort of gave the overview of your professional background. I assume we probably don't need that because you

probably know the information on that slide. So let's just go without it.

You worked for most of your career, before you joined the Office of the Fiduciary Advisor at State Street, you worked as a portfolio manager or a fixed income trader; is that fair?

A. Yes.

Q. And so then the time that you joined that office, that being the Office of the Fiduciary Advisor, that was sometime in 2003?

A. That's right.

Q. Okay. And so prior to that 2003 date when you joined that office, is it fair to say that you were not engaged in providing consulting or advice to retirement committees regarding fiduciary issues?

A. No, not exactly.

Q. In what capacity were you giving advice or consulting to retirement committees regarding fiduciary issues prior to 2003?

A. So in the five years as a portfolio manager at SSGA in the global asset allocation and currency group, the global asset allocation team, which managed between $20 and $50 billion, would frequently provide ideas and updates to DC plans and prospects to their retirement committees about potential use and structuring of multi-asset class strategies in their

lineup or a quick review of their lineup so they might consider what type of multi-asset class funds to include there.

Q. So you were giving presentations about the products that you manage?

A. We were giving presentations about that, yes, and also thoughts and insight to the retirement committee about what diversification lay in their plan lineups.

Q. Okay. But you're not being hired as a fiduciary advisor to that the committee, right?

A. That was correct.

Q. Starting in 2003, you were being hired as a fiduciary advisor to retirement committees?

A. That's correct.

THE COURT: Did you get that?

THE REPORTER: Yes.

THE COURT: You kind of tailed off a little bit.

Q. And in your career in that capacity as a retained fiduciary advisor to retirement committees ran through 2013, correct?

A. Correct. And let me just say, for some of the plans, it was -- technically, we conducted -- we contracted as a co-fiduciary. For some of the plans, we were the fiduciary. And in other -- for other plans altogether, it was predominantly advice. So it was a range. But yes.

Q. And then after you left State Street in 2013, you ceased engaging in that type of activity professionally, correct?
A. Not necessarily. So my work --
Q. Let me be more specific. I think I know where I screwed up there. As it relates to 401(k) plans?
A. Well, I attended conferences and financial conferences where there was this type of activity going on and where I continued to educate myself. And I did work for a law firm where some of the same themes and threads are necessary to run through really every portfolio. But predominantly for 401(k) plans, no.
Q. So after you left State Street in 2013, have you been engaged as a professional consultant to advise a retirement plan on its fiduciary practices?
A. No.
Q. Most of the time when you were at State Street doing this work -- or, excuse me, during the time that you were at State Street doing this work, most of your clients were defined benefit plans, right?
A. Well, I would say it this way, and the way I said it in direct. There were about 20 or 30 ongoing clients, but I worked with 30 to 50 clients. Many of the 20 came through -- 20, 30 came through as DB clients initially; however, the work that we did, we were asked by the DB client to perform studies and discrete projects or provide insight and advice to the

retirement committee about their DC plan. And in addition, many of those committees were the same committee overseeing the DB and the DC plan. So as we would present to them about state of the markets, performance of funds, issues that were happening in the market and educational topic, all of those things were listened to by the same committee members, who were looking at the DC plan. And so often, we were asked to provide additional insight on a -- on a maybe not ongoing basis for all of those.

Q. So in some instances, an entity will have both a defined benefit and a defined contribution plan, correct?

A. That's correct.

Q. And I believe what you're saying is that oftentimes, it's the same committee that oversees both of those plans and you're presenting to that committee; is that fair?

A. Oftentimes is not exactly right, but it's close enough.

Q. Okay. And so you're giving general information about the markets, other things, to that committee, without regard to whether it's DC or DB. You're just giving information to the committee, right?

A. No. I don't agree with what you just said. When you --

THE REPORTER: I'm sorry?

A. No, I do not agree with what you just said. The nature of our work was -- and in a new engagement probably took about four quarters to get to know a committee, the committee

members, the risk comfort of that -- and risk style of that committee, its DB plan, what else it offered in terms of other retirement work, the kind of asset classes they were comfortable utilizing, and the kind of funds that they used.

So in a DB arrangement, once you got to know that, you -- we then spent our time assisting clients with really enhancing or buttressing some of their fiduciary practices, their agendas and educational item about the markets. And most of these things applied both to DB and DC.

Q. Okay. During your direct testimony yesterday, I believe you testified that on an ongoing basis during your time at State Street, you had five defined contribution clients?

A. Yes.

Q. Does that sound accurate?

A. Yes. However, what I didn't share with you was that several of those plans were multibillion dollars with upwards of 50 different asset managers and multiple asset classes. So shear -- the shear number of DB plans alone doesn't tell you anything about the complexity or the issues that a particular DC plan has to deal with.

Q. So the defined contribution plans that you were advising used as many as 50 different asset managers?

A. That's correct.

Q. They didn't use a single asset manager, correct?

A. The DC plans that I was working with were ones that had

been established prior to them coming to me and my team for the work and advice. And as you probably know, a DC plan like the Retirement Committee like at American Century, committee members join a committee of a plan that already exists. You're not starting from tabula rasa. And so, you're coming in and looking at what does the Plan look like today, how does its asset allocation satisfy the needs of the plan and its participants, and how might it be tweaked. And in no -- none of the DC, the ongoing DC work that we had were -- was I working with asset managers. I was working with an asset manager who came on as a DB client who often asked us to do work on a DC plan. Sorry. That was my one ongoing DC plan. Yeah. Sorry.

Q. I apologize if I missed it.

A. No, I'm confusing.

Q. That's okay. That's okay. I'm not sure if I got -- if you answered my question or not, so let me try it again. None of the defined contribution plans that you advised ever used a single asset manager for all their investments; is that correct?

A. That is correct. However, one of the DC plans that I did advise used all but one in proprietary funds. All but one option in proprietary funds.

Q. Their own proprietary funds?

A. That's correct.

Q. And which one was that?
A. Which what was that?
Q. Who was that?
A. I'm not sure I'm at liberty to say.
Q. Oh, okay.
When you were working as an advisor, you offered advice to your clients as to how they should select asset managers, correct?
A. In some -- most cases, what we did -- so the short answer is not exactly. And the longer answer is the work that we did in many cases was actually to do the research and work around identifying asset managers to fill slots within clients' plans.
Q. So if you've got a slot, whether it's because the committee's decided they want to add a new asset class or maybe it's an existing asset class where they've decided to replace the manager, that's sort of the circumstance you're talking about?
A. I'm talking about -- just trying to think of a couple of examples -- potentially adding a new asset class or other.
Q. Other would be?
A. Or other -- replacing a manager, yeah.
Q. Okay. And so the process you used for doing that would be to look at -- well, within a given asset class different asset managers that have products that could fill that asset class,

right?

A. Well, it depended on the client, and it depended on the arrangement. Every plan that I've worked with has a totally different plan set of risks, set of funds. No two plans are alike. And there are a range of different work. So in some cases, when a strategy might have gone on a Watch List and/or needed to be replaced, that strategy might have been pulled from an internal set of funds or an external set of managers.

Q. When you were looking to find an asset manager for an asset class, you would look at specific managers that you knew had strength in that particular asset class, correct?

A. It depended on the client.

Q. At least in some instances that was true?

A. Yes.

Q. Okay. And in those instances, you typically would present three or four options to your client; is that fair?

A. So for our nonasset manager client, yes. However, I'm just wondering why the work that I did at State Street advising some of our clients applies to American Century.

THE COURT: Well, you -- you can't ask him questions.

THE WITNESS: Thank you.

THE COURT: I promise you, Mr. Fleckner is very good about objecting if it runs afoul, so -- but -- so please proceed, Mr. Specht.

MR. SPECHT: Thank you, Your Honor.

Q. Now because you were an asset manager yourself at State Street, you knew who the key players were in the major asset classes, right?

A. Yes.

Q. And those would typically be the three or four that you would present to your clients as options for a given asset class, right?

MR. FLECKNER: Objection.

THE COURT: I told you. Well, I think you -- the question was and you would typically be -- be the three or four that you would present to your client as options. An asset class. I don't think she testified to that. So this -- your -- Mr. Specht, you're looping back with things that she didn't testify to like she said those things. So please be careful about that.

MR. SPECHT: I will try, Your Honor.

THE COURT: I call it looping. What do you call it?

MR. SPECHT: I think looping is a fair word. Yeah.

THE COURT: Okay. It's the nicest word I can come up with.

MR. SPECHT: I figured there were maybe a couple of others you might have been holding back on.

Q. All right. So maybe I can clear up the confusion here. So is it true that when you're doing a manager search to fill

a particular asset class, you would typically look at three or four options?

MR. FLECKNER: Objection.

THE COURT: Well, I'm going to allow that question. Would you look -- she already testified she didn't. It depends on the client.

MR. FLECKNER: It depends -- that's --

THE COURT: She's already said -- she already answered that question, so I'll sustain that. She said it depends on the client.

Q. Sure. And for some clients you did, right?

A. For some clients, we might look at a larger number. And for some clients -- the reason I say it depends on the client is that at American Century, this particular committee had a lot of investment knowledge. They weren't hiring somebody like us to do work with them.

In my particular case, many of our clients were looking at us because they didn't have the capacity, the talent, the knowledge, and were not asset managers themselves in order to -- to seek and research and look at other managers, among other things, really. It was a broad holistic relationship on the whole plan, and asset management was just one piece of it.

Q. My struggle here, and I think why I'm getting into some of this looping, is I'm having a hard time figuring out if

there's an answer to the question or not so I want to limit it --

THE COURT: She's saying it's apples and oranges.

MR. SPECHT: Well, I understand that. I understand that.

Q. Setting aside this apples and oranges issue, when you're looking to fill a slot of an asset class where you're looking to find a manager, your practice in consulting with your clients at State Street was that you would typically look at a range of managers for that asset class; is that fair?

MR. FLECKNER: Objection.

THE COURT: It depends on the client. Please move on.

Q. Would you agree that that is the typical process in the Retirement Plan industry for finding a manager to fill an asset class? And by that, I mean looking at a range of options?

A. Well, you said --

MR. FLECKNER: Objection.

THE COURT: Overruled.

A. You said typical. And I think what I -- not I think -- what I wrote in my report and my experience in working with many plans and many committees is no two plans are alike. So you say typical, but I would not agree with the word typical in many ways.

However, if you're saying in a specific arrangement where a client has asked us to look at external asset managers and come up with a slate of some asset managers, would we look at a range of asset managers to provide, let's say, a particular asset class? Sure.

Q. And, for example, in certain asset classes, there are key players. Would you agree with that?

A. What do you mean by "key players"?

Q. I think that's a phrase that you used in prior testimony in this case. And so if you understand or recall that, what you meant by that, maybe you could explain it to us?

A. I'm not sure what -- could you just tell -- repeat where that was or what that context was --

Q. Let me try --

A. -- because I think the context matters?

Q. Sure. Let me try a different -- let me try a different example. Would you agree that in the fixed income or bond space, entities like PIMCO, Western Asset Management, or DoubleLine would be considered the key players in that space?

A. Well, I would say they would be asset managers who managed lots of fixed income, but where -- would you please remind me if that's in my deposition what the question that I was asked was?

Q. Setting aside your deposition, you would agree that in the fixed income space, those are some of the key players in that

area, right?

A. Those are some prominent asset managers in that space, sure.

Q. And then other asset classes are going to have other prominent asset managers, correct?

A. It depends on what you mean specifically.

Q. Large cap growth, there's going to be prominent asset managers in that space, right?

A. Over what time period? Over what -- I mean, I think it depends on when. Again, the short answer is it depends. I hope you're not surprised to hear me say that, right?

Q. Sure.

A. It depends on when you're talking about and for what purpose and for what level, a lot of things.

Q. Sure. Let's talk about 2010. In the large cap growth space, there were prominent managers in that space, right?

A. When you say "prominent managers," what do you mean by that?

Q. Would you consider there to be key players in the large cap growth space in 2010?

A. Well, what do you mean by "key players"?

Q. This is -- let's move on.

Yesterday, I believe you testified that in your career you had reviewed approximately 25 Investment Policy Statements. Does that sound right?

A. Yes.
Q. Isn't it true that for your 401(k) clients, you never substantively reviewed their Investment Policy Statements to make recommendations for improving them?
A. I -- would you just repeat that, please?
Q. Sure. For your 401(k) clients, you never substantively reviewed their Investment Policy Statements to make recommendations for improving them?
A. That was not one of the assignments that necessarily I was given, but I definitely have reviewed Investment Policy Statements.
Q. Okay.
A. 401(k) Investment Policy Statements.
Q. Regardless of whether it was an assignment you were given or not, is it true that for your 401(k) clients, you never substantively reviewed their Investment Policy Statements to make recommendations for improving them?
A. Can we just --
THE COURT: Your answer would be -- your answer would probably be that's true because that wasn't your assignment, right?
THE WITNESS: Yeah. I think that's approximately right for the -- a large portion of them, that's right.
Q. And then again, I think -- I don't recall if we covered this yesterday or not, but for the five 401(k) plans that you

advised on an ongoing basis, you didn't draft the Investment Policy Statements for those clients, right?
A. No. There was an Investment Policy Statement in place, which we reviewed and enhanced on occasion -- or they reviewed and enhanced on occasion.
Q. And there was one sort of a generic sample IPS that you provided to clients; is that fair?
A. Yes.
Q. Let's switch topics and talk a little bit about the process for selecting funds as it happened in this case. So there's one instance prior to 2016 where the Retirement Committee decided to add a new fund to the Plan, not as a replacement for something that was being removed, but just a new fund that went in. Do you recall that?
A. Can we just note which fund it was?
Q. The Strategic Inflation Opportunities Fund.
A. Yes.
Q. Did you remember that?
A. Yes, I do.
Q. Okay. And that, of course, goes without saying, that was an American Century fund, right?
A. Yes.
Q. Okay. Now, you were here for Mr. Levy's testimony, correct?
A. Yes.

Q. Okay. Mr. Levy testified that when the Committee decided to add that fund, they did not analyze whether it satisfied the performance and cost criteria for the fund selection in the IPS? Do you recall him giving that testimony?
A. I don't recall the specifics.
Q. Okay. Do you have any basis to dispute the assertion that when the Committee added the Strategic Inflation Opportunities Fund that it failed to analyze whether it satisfied the performance and cost criteria for fund selection in the IPS?
MR. FLECKNER: Objection.
THE COURT: Overruled.
A. I saw the Committee looked to add a strategy that filled a unique slot in the Plan lineup with this inflation protected strategy. I noticed too that in the Investment Policy Statement, it says that the Committee should look to satisfy these criteria, but it doesn't say they must satisfy all of the criteria.
Q. That's a little bit different, though. I'm asking whether they actually did, not whether they should or must, but whether they actually did?
THE COURT: I think -- I thought she answered your question, Mr. Specht. She said that she looked at that fund to fill a certain void or place within the lineup. And so she didn't directly contradict your expert. But I think her -- you know, she didn't take on Mr. Levy here, but she did say

she felt that that was appropriate, and it filled a space. Is that fair?

THE WITNESS: I did. Yes.

MR. SPECHT: Okay.

THE COURT: So that is your question, right?

MR. SPECHT: Sort of.

THE COURT: That was your question.

MR. SPECHT: I think so.

Q. Can we agree that in adding that fund, the Committee didn't analyze whether it satisfied the performance criteria in the IPS?

MR. FLECKNER: Objection.

THE COURT: If you know the answer, if you have a -- I'm going to -- overrule the objection.

A. Can you just remind me of the specific --

THE COURT: Can we agree that in adding the fund, the Committee didn't analyze whether it satisfied the performance criteria in the IPS is the question.

A. I just want to see the wording of the performance item in the IPS and the performance data.

Q. JX 54. I don't know the page number, unfortunately. So we can flip ahead, Karla.

A. I think it's like 4.

THE COURT: I'm really disappointed in that, Mr. Specht. You've spent a lot of time with JX 54.

MR. SPECHT: I have.

THE COURT: Okay. Let's -- let's thumb through it if we can here. And, Ms. Mann, tell us when to stop. You've probably spent a little time with it too.

THE WITNESS: I have.

Q. I think it's the next page, page 7.

A. Right here. Yes. Page 4.

Q. All right. Can you zoom in on that middle section?

A. Yep. Right. So you're saying number one.

Q. So, yes, number one. And I'll just read it. Performance should be equal to or greater than the median return for an appropriate, style-specific benchmark or peer group over a specified time period.

Did I read that correctly?

A. Yes.

Q. Did you find any evidence in your review of this case indicating that the Committee analyzed that criteria?

A. No.

Q. Okay. Then if we look at number 3. Fees should be competitive compared to similar investments.

Did I read that right?

A. Yes.

Q. And did you find any evidence that the Committee analyzed that criteria in adding the Strategic Inflation Opportunities Fund?

A. I did not see fee specific information. However, I would say that remembering that the SIOpps fund is comprised of three separate American Century funds, two of which were in the lineup and had been in the lineup for quite sometime. Right? So the three funds are an Inflation Protected Bond Fund, the International Bond Fund, and a Commodities fund. And the strategies, the standalone strategies were in the lineup, and that was -- you know, information was available. And the commodities fund was run by a portfolio manager who ran the gold fund, which is in the portfolio. So the strategy is -- the pieces and the people were well known to the organization.
Q. So if you're looking at this fund as compared to the other funds in the lineup, you would agree there's significant overlap between the strategies?
A. No, I wouldn't.
Q. Well, you would agree that two of the three parts that make up the Strategic Inflation Opportunities Fund are already in the lineup, right?
A. No, I wouldn't.
Q. I thought that's what you just said?
A. No.
Q. Okay. Where am I getting this wrong?
THE COURT: Okay. Hold on here. We are getting in the argument part of this and which we don't allow on

cross-examination, as you've heard. And so just ask the question, answer the question. I don't want you to argue with the witness. I don't want the witness to argue. But that -- that's what this is. It's just asking questions and getting answers. And I always say this, you may not like any of her answers, but you're stuck with them. So please proceed.

MR. SPECHT: I appreciate that, Judge.

Q. Can you explain what you were just talking about again in terms of the strategies already being in the lineup or something to that effect?

A. Sure. Perhaps it would be useful to say the SIOpps fund was an inflation strategy to try to protect against inflation. Right? There were a number of new strategies and strategies -- I'm sorry, what I wanted to say is the inflation protection was something that many asset managers were concerned about. I saw in the record this committee talking about inflation concerns in their records and in their minutes in prior times. So in this global financial crisis where the Fed lowered interest rates to incredibly low levels, there's an expectation that inflation was going to begin to shoot up very rapidly. And what I saw -- and this strategy, the SIOpps fund was -- was intending to add value by reweighting the different components of the fund that -- that -- the TIPS fund, the International Bond, and the Commodities fund. And so the goal here was inflation protection by moving through

these funds. So it wasn't -- that strategy was not the same as the individual parts. It was using them, but it was using them in a different -- in a different way.

Q. Okay. Let me see if I understand. The Strategic Inflation Opportunities Fund has three main components; is that fair?

A. That's right.

Q. Okay. One of those is the TIPS fund; is that fair?

A. That's right.

Q. That fund's already in the Plan, correct?

A. Yes.

Q. Okay. And then the second component is the International Bond Fund, right?

A. Yes.

Q. And that one's already in the Plan as well?

A. Yes.

Q. Okay. And then the third one is the Commodities --

A. Uh-huh.

Q. -- component?

A. Yes.

Q. And that's not in the Plan?

A. Correct.

Q. Now, I think you said that at this time, this concern with inflation was sort of widespread in the industry; is that fair?

A. Yes. In fact, we see it in the meeting minutes. And I think Chris Bouffard mentions concerns about inflation. And there were several meeting minutes that I recall talking about inflation concerns.

Q. And I think you also said there were a number of new strategies that were coming on the market at this time as a result of that concern; is that fair?

A. Yes.

Q. Okay. So the American Century fund is not the only fund on the market in this category, correct?

A. Yes.

Q. Some questions yesterday -- or at least one question yesterday about Mr. Levy's five quarter rule. And I -- what I'm referring to there is his statement that funds should not be in the Plan for more than -- or on the Watch List for more than five quarters. Do you recall that?

A. I think it was stated that way but --

Q. Okay.

A. -- I agree to the general concept of what you're saying.

Q. Okay. Karla, can you pull up PX 455?

This is Mr. Levy's report. You reviewed this report in forming your opinions in this case, right?

A. Yeah.

Q. Karla, can you go to page 15? And blow up paragraph 56, please.

Paragraph 56 of this states, In my experience, it is highly unusual for a fund which remains on a Watch List for five consecutive quarters to remain. For that to occur, there would have to be a prudent and documented reason that justifies a fund's retention.

Did I read that correctly?

A. You did.

Q. Okay. So do you understand Mr. Levy to be saying that after five quarters, you're automatically out of the Plan?

A. No.

Q. Okay. What he's saying is that after five quarters, for a fund to remain in the Plan, there should be a prudent and documented reason that justifies fund -- the fund's retention, correct?

A. If you say so, yes.

MR. FLECKNER: Objection.

THE COURT: Yes.

MR. FLECKNER: There's a separate paragraph in Mr. Levy's report that says something different about five quarters. This isn't the only place that Mr. Levy talks about --

THE COURT: What's the other paragraph?

MR. FLECKNER: It's paragraph 103 where Mr. Levy says, In my experience, a fund which has been on a Watch List for five consecutive quarters will be removed unless there's a

prudent and documented reason.

THE COURT: You -- do you agree with that, Mr. Specht? Is it 103 and 56, do they contradict each other?

MR. SPECHT: No. I think that's saying exactly the same thing. If it's been there for more than five quarters, it will be removed unless there's a prudent reason to keep it.

THE COURT: Well --

THE WITNESS: Oh, that's different than this.

THE COURT: Hold on. Hold on. Hold on.

THE WITNESS: Sorry.

THE COURT: 103 -- what Mr. Fleck's [sic] reading to me that it's automatically removed, is that -- isn't that what 103 says, Mr. Fleck?

MR. FLECKNER: That was our reading of --

THE COURT: Well, let's put up -- Karla, could you help us out with this?

MR. SPECHT: What page is that?

MR. FLECKNER: I'm sorry. Mr. Levy's report, page 29, carry-over to page 30.

THE COURT: Let's take a look. Well, this says with number of years.

Okay. A fund which has been on the Watch List for five consecutive quarters will be removed unless there is a -- that is what Mr. Specht is saying. That's consistent with paragraph 56.

MR. FLECKNER: That's fine. I thought he was contradicting that there was a will be removed component. That's all.

MR. SPECHT: I think he's saying the same thing, Judge.

THE COURT: I'm with Mr. Specht on this one, Mr. Fleckner.

MR. FLECKNER: Fair enough.

MR. SPECHT: Okay.

THE COURT: Let's get back to this. I'm sorry, Mr. Specht.

MR. SPECHT: That's okay.

Q. So let's just talk about this concept. After five quarters on the Watch List, the concept I think that's being advanced here is that if the fund is going to remain in the plan, i.e., not be removed, there should be a prudent reason to keep it in the Plan. Would you agree with that concept?

A. Sure. However, I would just say that as a practitioner, that may be a lot different than somebody who is looking at these things theoretically. Both as a former portfolio manager and as somebody would has sat with retirement committees and gotten a phone call from retirement committees who are saying, you know, this strat- -- you know, the markets are doing this, what should I do about this. We -- it is very important to go back to the reasons that a strategy was put

into the portfolio, what role that it plays, and the market environment that it is living in. So I think, as I said yesterday, there can be market environments where a particular style is out of favor for some time, and we may be talking several years. And so it is not enough to just say okay, five quarters, it's out unless we have a good reason. If the Committee is looking quarter in and quarter out or in their meeting cycle as to -- and they know the historic body of work of why the strategy was added to the portfolio, they don't need to repeat this and state that for each and every fund in the lineup at each and every meeting. They know this body of work.

Q. What if they don't know the historic body of work? What if they don't know the reason why it was originally included?

A. I mentioned yesterday that I thought that it was exemplary the way that American Century's Retirement Committee is trained in their fiduciary duties and provided with recent meeting minutes, a summary of the Investment Policy Statement, as well as the Plan lineup. So I think this particular Committee, more than many others, is highly educated as to what the overall plan is before they were asked to step into the job of -- of Committee member.

Q. But you would agree --

A. So I wouldn't see that happening here.

Q. You would agree that if the Committee or members of the

Committee don't know why it was included, then they would need to do a deeper dive on what's happening with this fund and make a decision about whether it should continue to be there, correct?

A. Well, I feel like you are looking at one specific item and trying to judge whether a committee or somebody does a good job. Remember that this is a whole Plan. It's made up of many investment strategies, and it's a body of work that's happening over months and quarters. The Committee cannot highlight and prioritize each and every item at each and every meeting. I think utilizing Watch Lists and having a good Watch List tool, like American Century did, is very diligent and is what should be done for strategies that are on the Watch List, yes.

Q. So as I understood your testimony, what I thought you were saying is that when a committee has an understanding of the historic background, including the reasons that a fund is included, the role it plays in the plan, and the market environment that you're in, that those would be the types of things that the committee would understand and would make it okay to hang onto a fund that's on the Watch List for an extended period of time. Is that fair?

A. Yes. More or less.

Q. Okay. So my question is if you don't have that historic background, if you don't know, then the result would be

different, right?
A. I guess it depends. It depends on who the committee is and what you're talking about.
Q. And the list that you gave, the reasons included, the role, the market environment, those would all be prudent reasons for maintaining a fund in the Plan, right?
A. Could be. Depends, again, on what the strategy is, what the story is, what's happening.
Q. Uh-huh. So that would be consistent with what Mr. Levy was saying about having a prudent reason to retain the fund beyond a certain point in time, right?
A. I don't pretend to know what Dr. Levy was saying.
Q. Sure. But in terms of how you view that analysis about what would be a prudent reason to hold onto a fund, those would be examples, right?
A. There are a wide variety of reasons to maintain a strategy. So I...
Q. You spent some time yesterday talking about issues like the level of contributions that were made by the employer, in this case American Century, the auto-enrollment feature, the auto-escalation feature, the educational resources that were provided. Do you recall that testimony?
A. My testimony or someone else's?
Q. Yours.
A. I testified not to all of that --

Q. Okay.
A. -- but some of it, yes.
Q. You heard other testimony from others on all of those, right?
A. Yes.
Q. Okay. And you would agree with me that those are not actions that the Committee is taking in a fiduciary capacity, would you not?
A. Could you --

MR. FLECKNER: Objection.

THE COURT: Well --

MR. FLECKNER: It calls for a legal conclusion, amongst other things.

THE COURT: Well, I'm going to give you some leeway here, Mr. Specht, on that one. So do you believe this is all part of the fiduciary role of the Committee?

THE WITNESS: The Plan design is something that the firm sets out. However, in the Investment Policy Statement, I see the intention of American Century stated to be able to provide and retain employees but to help them provide for their retirement and to save for the long term. And that -- I think it's perfectly reasonable for the Retirement Committee to understand and look at the Plan design as they go to do their work, because, for example, if a plan design didn't provide any match, for example, the Committee would have to do

a lot of work to encourage a lot more savings, as we heard Ms. Gallagher say yesterday. The savings and the participation rates are gigantic part of individuals' abilities to save. So the Retirement Committee must look at this because it's a part of what they -- they have to deal with. And they know their Plan populus. And they need to be able to identify, I think like Ms. Gallagher said, should auto-escalation or other nudges continue to propel savings, which in the end is what we all want, individuals to save in their retirement plan.

Q. So you used an example of a matching contribution as a Plan design feature in your answer, right?

A. Yes.

Q. Okay. And would that or other Plan design features, in your opinion, diminish the Committee's responsibility to follow prudent process in maintaining the Plan's investment menu?

MR. FLECKNER: Objection. And, I mean, we can stipulate this again, the PCRA on the first day, there's never been an argument that any sponsor activity diminishes any fiduciary responsibility. It's just --

THE COURT: I'm going to allow the question.

MR. FLECKNER: -- made up.

A. Would you repeat the question, please?

Q. Is it your opinion that these Plan design features you're

describing diminished the Committee's obligation to follow a prudent process in maintaining the Plan's investment menu?

A. No. This particular Committee had a wide variety of asset classes, an attractive diversified core lineup, a PCRA, educational help for those who needed it. I was impressed with this.

THE COURT: You know, we start out here with this witness coming in here and saying I looked at the Plan. I looked at other plans. They're doing a great job. And then I feel like your questions are a list of questions meant to -- to trick her to not follow her -- not support her recommendation. Certainly, I think it's -- it's appropriate for you to ask questions about, well, is this -- like that question I do think it's all right, that in this -- does this undermine their efforts to be a good and prudent Plan Retirement Committee.

But, I -- I mean, she's -- she's watching your words very carefully, as she should, and I am too. I just want you to know, this game of gotcha isn't going to work at all with the trier of fact at all here. So I just want you to -- because I feel like that's what this is, an exercise of gotcha, Mr. Specht, to be quite honest with you. And that's not a good strategy with me. I'm just telling you, that's not going to -- this is not gotcha. This is, listen, here's her opinion. She came a long way to give this opinion. I assume

she still believes in the opinion even after Mr. Fleckner sat down. And I just -- I just want you to streamline this because there are good questions you can ask. But let's not do gotcha for a while. Let's take a gotcha break. All right? Please.

And if you change your mind during the course of your testimony, would you let us know?

THE WITNESS: Thank you. I will.

THE COURT: All right.

THE WITNESS: Yes.

Q. Okay. You talked, I believe, about the level of matching contributions as one of the examples you gave for Plan design. And in this case, I believe the record will show that as of 2013, the matching level was 4 percent of eligible compensation. Does that sound right?

A. I'm not a hundred percent certain that that was right at 2013, but it sounds right. However, what I think I said in my report was the contributions of American Century were very generous. And we saw that in the Hewitt report. Well, I don't know if it was the Hewitt report or another report. That American Century's overall contributions in total, matching and profit sharing Plan, were among -- you know, among the -- were high and so encouraged savings. That's important. That's, I think, consistent with an organization that wants to help its employees save for retirement.

Q. And then at some point, the level of matching went up to 5 percent. Does that sound familiar?
A. I don't remember where that was. I don't remember seeing that, but --
Q. Okay. Okay. Your experience at State Street, the matching contribution there is 5 percent. Do you recall that?
A. I don't -- I actually don't remember what the match was.
Q. Okay. There was a match?
A. Sort of a shoe the cobbler thing. Like if you're asking about my personal account, I was more concerned about clients than my own.
Q. Okay. So you don't know what -- the level of match you received at State Street?
A. I don't remember.
Q. Okay. Do you recall whether State Street provided a defined benefit plan in addition to the defined contribution plan?
MR. FLECKNER: Objection.
THE COURT: Overruled.
A. It depends on when.
Q. At some point in time, they did?
A. Yes.
Q. Okay. Do you recall whether State Street had auto-escalation as part of the 401(k) plan?
A. I don't recall.

Q. How about auto-enrollment, do you recall?
A. Don't recall.
Q. Karla, can you pull up DX 766?
You recognize this document, correct?
A. I do.
Q. This is a chart you prepared that looks at the total plan cost or the cost of the American Century Plan, right?
A. Right. On the core plan assets. So it's exclusive of the PCRA and the loans.
Q. Okay.
A. Yes.
Q. And the -- Karla, maybe you can just blow up the table.
The overall level of cost went down from 2010 to 2016, right?
A. That's right, from 82 basis points to 58 basis points on Plan assets, yeah.
Q. And the overall trend in the industry during this time frame was also for cost to go down, correct?
A. Sure.
Q. In preparing this chart, you didn't do any sort of a comparison to what other plans were paying during these time frames, did you?
A. No, I don't agree with you. I actually looked at several other places. And I also saw places in the record where the Committee looked at overall Plan costs, like the Deloitte fee

study. So -- so, yes, I did see that. And, frankly, I consider this one of the strong proof statements that the Committee was doing its diligent work in reducing plan costs, going to lower cost share -- share classes overall. This is -- and doing their work to reduce recordkeeping fees where -- where possible, yeah.

Q. So just focusing on this chart for now, the chart doesn't have any comparative data on what other plans are paying, correct?

A. No.

Q. Okay. And you mentioned the Deloitte study. That was a study from 2009, right?

A. I don't remember what year the study was.

Q. Okay. Did you do anything to look at how these costs compared to averages across 401(k) plans?

A. No. I mean, I did observe that through some of the work that I looked at, but that wasn't part of my -- my kind of assignment. What I would say is -- actually, let me just say -- let me think for a minute before talking. Yeah. I did -- I did see American Century's fees relative to others in a couple places in the -- in the material.

Q. Karla, can you give us PX 451? And blow up the table.

PX 451 is a chart prepared by Dr. Pomerantz that compares the fees on this Plan against a number of other comparators. He's got two sets of statistics from ICI. He's

got Hewitt. He's got the Largest. And he's got Vanguard. Do you see that?

A. I see that, yes.

Q. And you didn't do any sort of analysis like this comparing the fees that this plan paid to averages from ICI or other composites or other options, did you?

A. No, I didn't.

Q. Okay. And you don't have any basis to dispute Dr. Pomerantz's analysis, do you?

A. Well, I guess what I -- I'm not trying to dispute his data, but -- he has it here, but remember that the Hewitt study that compared American Century's fees used -- the plans that it compared, if I recall, had assets that were double that in their typical plan of American Century's. And they also had a number of participants that was about -- an average number of participants of about 17,000, compared to American Century's approximately 2,200.

So when you look at plan costs and you look at that dollar value of what it costs, you have to divide it by something. And one of the somethings is the number of participants. So a lot of the data depends on what the underlying studies you're looking at are. So I don't dispute that Dr. Pomerantz got this data and looked at it and compared it. But what I guess I would say is is he comparing it to other active managers? Of course, with an all active lineup,

which is what American Century Plan predominantly was, it -- it's going to have higher fees than maybe an average of a whole bunch of other plans. If he looks at it against other asset managers, he might come up with a different number. So, no, I'm not disputing this, but I'm not sure it's a reasonable comparison.

Q. So one of the things you just mentioned -- and I think Hewitt points this out as well -- that the all active lineup in this Plan drives a higher level of fees; is that fair?

A. No. What Hewitt said was that the recordkeeping fees are lower than other plans and that the investment management fees were higher average by virtue of being active.

Q. And Hewitt also says that by including passive funds in the investment mix, that would lower the overall fees paid by participants, right?

A. Sure.

Q. And you don't disagree with that, do you?

A. No, I don't. That's math.

Q. You talked about the Committee considering in the wake of Hewitt the philosophy of active management, right?

A. Yes.

Q. Do you see anywhere in the record where the Committee did any analysis of how adding the passive categories that Hewitt recommended would have impacted the level of fees that were being paid?

MR. FLECKNER: She already testified to this in direct.

THE COURT: I -- we've touched on this subject, but I'm going to allow the question, just because I forgot what the answer was on direct.

A. Could you repeat the question, please?

Q. Sure. Did you see anywhere in the record where the Committee analyzed the impact that adding the asset -- the passive funds that Hewitt recommended, where they analyzed what impact that would have on these fees?

A. The way you just said that, Hewitt didn't suggest what you said, the index funds that Hewitt suggested adding. Remember that American Century had a passive fund in the lineup through 2013. And if you're talking about the other individual asset classes, is that what you're saying?

Q. There were --

A. Help me understand.

Q. -- four additional asset classes that Hewitt identified would be helpful to have index funds in those asset classes, correct?

MR. FLECKNER: Misstates.

MR. SPECHT: We can go to JX 10 and look at it if we want.

THE COURT: Yeah. Let's go to JX 10. And how much longer do you got here on this cross?

MR. SPECHT: A little while.

THE COURT: Well, we'll see. It's -- you got 12 minutes at least until our first recess.

MR. SPECHT: All right. Let's go to JX 10. And, I -- Karla, you can flip through.

THE COURT: Why don't you ask Karla to flip through where you're talking about.

MR. SPECHT: Yeah. I don't have the page number memorized. Here we go. That's the one.

Q. The second bullet point. Consider adding passive investment options in the core asset classes where they are not currently offered: diversified bond, small/mid cap equities, and international equity. This will help to reduce overall fees to participants.

Do you see that?

A. I do.

Q. Okay. Did you see anywhere in the record of this case where the Committee considered the impact on fees that would result from adding these passive options in these asset classes?

A. No. However, I did see the Committee look at -- so, again, remembering these are considerations, they're not recommendations. And I saw the Committee look at and consider the potential thought or discuss active versus passive. I saw them shift to lower cost investment vehicles. And I saw them

eliminate several underutilized funds.
Q. Let's see if we have DX 859 available. We do. Great.
This is a demonstrative that you prepared, correct?
A. That's right.
Q. Okay. And what this is showing is transitioning to lower cost investment vehicles during the time frame relative to this case, right?
A. That's right.
Q. So you've got one here, July 15, 2015, 1 Plan mutual fund switched from investor class to institutional class. Do you see that?
A. Yes.
Q. And that was a savings of 20 basis points, right?
A. That's right.
Q. It's a significant savings, in your view?
A. It depends on who's in it, how much assets are being used. But, yes, it's a reduction. Absolutely.
Q. Okay. And do you recall that that is the short-term government fund?
A. I don't recall which of the funds is applicable to each of these items.
Q. Okay. Do you recall that the fund in question here, that the institutional share class had been available to the Plan since the beginning of the class period in this case, since June of 2010?

A. No.

Q. DX 755, please.

MR. SPECHT: Judge, I'm moving along as quickly as I can here, skipping a few topics.

THE COURT: Thank you.

Q. Karla, can you blow up this sort of top portion?

Ma'am, this is another document that you prepared as part of your report, correct?

A. Yes.

Q. And this collects all of the assets that were in the American Century Plan and gives the levels throughout the years, correct?

A. There are two pages, yes.

Q. Yeah. There's multiple pages, right?

A. Yeah.

Q. So here we've got U.S. equities. And it looks like there are two that are benchmarked to the S&P 500. Do you see that?

A. I do.

Q. And we can go to the next page, Karla. And blow up the top again.

And then up until 2012, we had an index fund that was also benchmarked to the S&P 500. That's the American Century Equity Index, right?

A. In this report it's 2012. I think we used year-end. So I think it was into -- well into 2013 that the fund existed.

Yeah, for two -- two and a half, 2.6 percent of the assets, that's right.

Q. So it was in the Plan through year-end 2012 and then carried over into '13 but was closed at some point in '13?

A. That's correct. That's the best of my knowledge.

Q. And your data shows that at the end of 2012, that index fund had 13.88 million in assets?

A. Right.

Q. Let's go back to the prior page. And so in that time -- same time frame, 2012, the other two that we had in the Plan that were benchmarked to the S&P 500 had less assets, right?

A. But about the same amount, depending on how you're measuring. Yes, less, 11 and 12 million, yeah.

Q. But the index fund had the most. Would you agree with that?

A. If you're asking the math of those three numbers, yes, I am. However, remember that the way that participants might use these strategies, they are large cap allocation, or they're U.S. equity allocation, might have been to multiple funds. It could have been to several funds. They might have preferred the -- the more diverse Russell 3000, which captures not just large, but mid and small cap. I mean, I'm not sure what you're trying to say here because we can't know from the way participants allocated their assets from this data how they're allocating their large cap funds.

Q. We can know that, from what participants are doing, where they have three options for funds that are benchmarked against the S&P 500 Index, the one that had the most assets was the index fund, right?

A. Well, you may say that you know that, but I would not agree with you. I think that when I've seen participants allocate assets across a range of different U.S. funds, they might use -- they might choose to use an S&P 500, a mid, a small. They might choose the Russell 3, and they might want more small cap exposures, so they might use more small. They might use Russell 1. They might use growth and value. So I don't think it's fair at all to say that this is -- and we can't know from this data -- we can't know from this data.

This does not tell us anything about how the participants are allocating their portfolio's large cap assets and how they are using -- which large cap funds or combination of U.S. equity funds they are using, other than to say the balances in these funds at this time are these numbers. But I think it would be absolutely inaccurate for you to compare it the way you were doing.

Q. The only comparison I'm trying to make is to the total balances. The balance in the index fund is greater than the balance in the other two funds. That's accurate, right?

A. The balance --

THE COURT: Not allocation. He's not -- you're not

saying allocation at this point. You're saying they just -- there's -- it's more popularity. Is that a better way to say it?

MR. SPECHT: I'm just talking balances, the dollars.

Q. It's more money in the index fund than the other two, right?

A. I think if you're just saying these three funds, of course, yes. But what I would say is I don't think you're doing a reasonable comparison if you're trying to get a measure of large cap funds.

THE COURT: Yeah, yeah. That's -- that's okay. I mean, he -- I understand what he's trying to accomplish, and I think we agree that that number is bigger than the other two numbers, right?

MR. SPECHT: It doesn't seem very controversial.

THE COURT: All right.

THE WITNESS: It's math.

THE COURT: All right. I think -- I don't know where the word allocation got in there, but that's what kind of threw me, so -- and that's a word that has a different meaning, right?

MR. SPECHT: I hope that I wasn't the one that put that word in there because I didn't --

THE COURT: Well, we'll find out over the break. I'll tell you that, Mr. Specht.

Q. All right. So when that American Century Equity Index Fund closed in 2013, it wasn't replaced by another option, right?
A. It wasn't replaced -- I'm sorry. Could you say that --
Q. It wasn't replaced by another index fund, correct?
A. That's correct.
Q. There were numerous almost identical index funds available on the market, right?
MR. FLECKNER: Objection.
THE COURT: Yeah. We covered this. There was a lot of different index funds in the market. You -- you have proven that.
Q. Well, index funds that are going to invest in exactly the same underlying securities?
A. And there were thousands of investment options available through the PCRA for that as well.
THE COURT: That's the answer we always get on that.
MR. SPECHT: That is the answer we always get. It seems like the PCRA is sort of the answer to everything.
THE COURT: Well, I don't know if that's right, but the Court will note there are thousands of index funds.
Q. Okay. And, in fact, the Committee could have gone on the open market and got an S&P 500 Index Fund for significantly cheaper than what the American Century Equity Index Fund had been charging prior to the time it was closed, right?

A. I don't know what was available at that time. I can't speak to that.
Q. You're not aware of what was available in the S&P 500 Index Fund market in 2013?
A. Correct.
Q. Okay.
THE COURT: You got three minutes.
MR. SPECHT: I'm crossing stuff off the list.
Q. Let's go to DX 509. These are the meeting materials for the October 23rd, 2014, meeting of the Retirement Committee. And you can see here that within these -- this packet, there's a presentation by Schwab. Do you see that?
A. Yes.
Q. Okay. And if we go to page 41, Karla. This is the -- the first page or the Schwab sort of insert that was in this overall packet of materials. Just kind of orienting you to this.
So now let's go to page 111. And here we've got, in the Schwab materials, a fiduciary -- you can just leave it like this, Karla. You don't need to blow it up.
Fiduciary Best Practice Checklist. Do you see that?
A. I do.
Q. And it looks like Schwab has gotten this from that Fi360 organization. You're familiar with that organization, right?
A. I wasn't until the start of this program.

Q. Okay. Fair to say that Schwab was familiar with that organization at this time, right?
A. At this time, sure.
Q. And that's -- that's an organization that Mr. Levy works with in the work that he does now, right?
A. That's what I heard him say.
Q. Okay. And do you have any disagreement with this Fiduciary Best Practices Checklist?
A. I don't. It seems just as good as any fiduciary ideas and best practices. I've seen JPMorgan produce one. We saw one earlier. I've seen Schwab. I've seen this one. I've seen lots of other ones that I've -- I would say shared and thought about with clients. But there are some key threads that run through all of these. But there's no one specific checklist that should be used for this.

MR. SPECHT: Good time for a break, Judge?

THE COURT: Yeah. That would be great. We'll take a 15-minute break. Thank you all.

(Recess at 10:29 until 10:48 a.m.)

THE COURT: All right. Mr. Specht, sir.

MR. SPECHT: Thank you, Your Honor. I did get a chance to narrow down my categories a little bit here, so just a couple more. In hopefully 15 or 20 minutes, I'll be done.

THE COURT: I really appreciate that, Mr. Specht. Thank you, sir.

MR. SPECHT: My pleasure.

Q. Welcome back, ma'am. Yesterday when Ms. VanWagoner was on the stand, I went through a -- an example of the meeting materials that the Committee had during the JPMorgan era. And I'm not going to go back through that with you again. But then at a point in time, we switched to the Schwab era. I think that's kind of the line of demarcation that Mr. Fleckner used with you yesterday. Are you generally familiar with this change of recordkeepers?

A. Yes.

Q. Okay. And I think the example Mr. Fleckner gave you for the Schwab era was DX 511.

Karla, could we have that?

So here we have a set of meeting materials from July of 2015. And you can actually even see the little holes here where they were originally in a binder and then got pulled out and photocopied. And you'll notice here that this has got -- somewhere on here, there's -- well, let's just go to the second page, Karla.

So the first thing that's in this booklet is this Schwab Investment Management Trends report, and I'm not going to ask you about that. We can skip through it. So we're going to skip ahead a bunch of pages, actually up to page 36.

And now we get to something that looks familiar. This is the Watch List, both the listing of funds on the Watch

List, and then also the methodology that's used. And this -- it looks similar to the way this was set up in the JPMorgan era, right?

A. Yes.

Q. And so, Karla, if we can then skip to page 47. And maybe just blow up that first one, the large cap growth. And again, this is the same sort of reporting that we saw in the example that I used yesterday with Ms. VanWagoner in terms of gross return and the benchmark and all those things. Do you see that?

A. Yes.

Q. And this is similar to the type of reporting we had in the JPMorgan era as well, right?

A. My understanding is this benchmark report was provided throughout, yeah.

Q. Yeah. Same benchmark report?

A. Yes, yes.

Q. Okay. That didn't change. Great.

And then if we go all the way to the end, page 91. So all the way at the end, we have some new stuff. And this is the page that Mr. Fleckner went over with you yesterday. This is sort of a -- in the Schwab era something that's new that we didn't have in the JPMorgan era, right?

A. Some of this information is new, that's right.

Q. Yeah. So let's -- let's -- maybe you can just blow up the

table, Karla, so it's a little bit easier to read.

So this is -- similar to the earlier reporting, this is the Plans that are -- excuse me, the funds that are in the Plan. And we've got some performance information and some fee information, right?

A. Yes.

Q. Okay. And in -- for each fund, do you see that there's a -- a category listed?

A. Yes.

Q. What do you understand those categories to represent?

A. The asset class that this strategy might be -- that Schwab might have considered this to fall into.

Q. Okay. And then within that asset class, there are comparisons. You see the percentile rank and the number of funds in these columns?

A. Yes.

Q. And those are comparisons to the other funds in those categories, correct?

A. That's correct.

Q. Okay. Do you know whether these categories include all share classes or whether they're limited to, for example, the R6 share class for a fund where we've got an R6 in the Plan?

A. I don't know off the top of my head. Is it in the book -- is it in the footnotes at the bottom?

Q. I couldn't find it anywhere in here. But I do have --

let's see here. If we go to -- let's look at large value. So the large value category, Schwab is representing -- whoops. I kind of -- about 1,300 funds in that category. Do you see that?

A. Yes.

Q. So large value, they've got about 1,300. Karla, let's go to PX 460 really quickly.

So this is the 2017 ICI Fact Book. Are you familiar with ICI?

A. I am.

Q. And, Karla, could we go to page 240?

So we were looking at large value. And you're going to find this faster than I'm able to. Here we go. Large value. The number of funds that they're reporting is about 300. And then the number of share classes is over a thousand.

Do you see that?

A. I'm familiar with ICI, but I'm not necessarily familiar, nor have I looked at this recently or lately, so let me just take a look, please.

Q. Sure. Take your time.

THE COURT: Now, we had a 322 -- 322 circled, number of -- what is under that?

MR. SPECHT: My understanding, Your Honor, is that that is telling us that in 2016 in the large value category, they're reporting that there are 322 funds in that category.

THE COURT: But you've circled it. It says number of something classes. Number of share classes in there.

MR. SPECHT: Oh, yeah.

THE COURT: I'm sorry.

MR. SPECHT: That's right.

THE COURT: Yes, sir.

Q. So my understanding of what's being reported -- and, Ms. Mann, maybe you can correct me if you have a different understanding -- is that in 2016 in the large value category, there were 322 funds, and there were over a thousand share classes. Is that consistent with your reading of this table?

A. I don't know what -- I'm not familiar with this specific report. It looks like that, but I'm not a hundred percent certain.

Q. Given your extensive background in this industry, does that sound roughly accurate to you that there would be about 300 -- a little over 300 large value funds and then within that, over a thousand share classes?

A. I'm not sure about the thousand share classes, yeah.

Q. What's your understanding of the number of large value share classes?

A. It's not about large value share classes, but it's about number of share classes, right? This sounds like a large number of share classes.

Q. Okay. Okay. Well, if we go -- if we go back to where we

were a minute ago, which is DX 511, page 91. And for our large value category, we see that they're reporting -- whoops -- during different time frames --

A. Uh-huh.

Q. -- and including in the one year, more than a thousand funds, right?

A. So this is Schwab's report. And the other one we looked at was ICI. So they may not be exact. So I'm not a hundred percent certain which is referring to what.

Q. Right. They don't line up exactly, but that suggests to me that the 1,305 is the including all share classes, not limited just to, for example here, an R6 share class?

A. Maybe.

Q. And, in fact, if you look at the funds, the American Century funds, we've got an institutional fund, an R6 fund and a CIT and then another R6. Do you see that?

A. Yes.

Q. So those are all different share classes or for the CIT a different vehicle, right?

A. Uh-huh.

Q. And they're all being compared to the same category, right?

A. By Schwab in this report, yes.

Q. Yes. So the information that's provided in this report, this new Schwab report that we didn't have before, is

basically comparing funds across different share classes or different vehicles, right?
A. Maybe. Yes.
Q. We've also got in this report net expense ratio. Do you see that?
A. Yes.
Q. And we've got a ranking for net expense ratio, right?
A. Yes.
Q. And, again, we have the -- the same issue in the sense that those rankings and those comparisons are including all share classes, right?
A. Well, if you say so. Whatever it is, it seems like Schwab is doing it consistently across both performance and fees, yes.
Q. We know just from looking at just the American Century funds that are included here that we've got different share classes or different vehicles, right?
A. For American Century, yes.
Q. And so there's nothing here that would suggest that they're segregating out, for example, R6 to R6 or CIT to CIT, right?
A. No. I mean, yes, you're right.
Q. Okay. Karla, you can take that down.
So I believe your testimony, as I understand it, is that it is consistent with industry standards and practices

for American Century to maintain an investment menu that consists exclusively of proprietary funds; is that fair?
A. What's -- could you repeat that, please?
Q. Yeah. Is it your testimony that maintaining a menu of exclusively proprietary funds is consistent with industry standards and practices?
A. American Century maintaining a lineup of American Century funds. Over what time period are we talking? I just want to make sure --
Q. Starting in 2010 and running up until the time frame that the Vanguard funds were added in 2016.
A. Okay. And would you repeat the question again?
Q. Is it your opinion that American Century in maintaining a lineup that consisted exclusively of proprietary funds, that they were acting consistent with industry standards and practices over that time frame?
A. I would say they were acting within a range of reasonableness and across a range of industry standards and practices that I have seen among asset manager firms, yes.
Q. So the range of industry standards and practices that you're comparing their conduct to is the standards for asset management firms?
A. No.
THE COURT: It's the standards for other mutual fund companies that have mutual funds that provide this defined

contribution or this DC plan, true?

THE WITNESS: The way Mr. Specht just asked the question was about conduct --

THE COURT: I know. Yeah.

THE WITNESS: -- so -- but yes --

THE COURT: That's been your testimony.

THE WITNESS: -- the lineup is consistent with what I've seen. Absolutely. Their conduct was overall exemplary.

THE COURT: And apples and oranges, right?

THE WITNESS: Yes.

THE COURT: Sometimes when a company is in this business, they tend to have more proprietary funds versus companies that are outside of this -- U.S. Steel --

THE WITNESS: Right.

THE COURT: -- does not have proprietary funds, right?

THE WITNESS: Correct. Yes.

THE COURT: Okay.

THE WITNESS: Yes.

THE COURT: And that's what you're talking about it's consistent with --

THE WITNESS: Yes.

THE COURT: -- true? Okay,

MR. SPECHT: Yeah. I think we've seen on a number of occasions now that Your Honor is much better at asking

these questions than the lawyers are.

THE COURT: Well, I'm trying to cut through this because --

MR. SPECHT: You're helping.

THE COURT: -- this has been her testimony and...

Q. Okay. So the industry standards and practices that you're talking about are the standards and practices for mutual fund companies or asset managers, right?

A. No. The standards and practices that I'm talking about overall in looking at American Century's behavior, prudence, diligence, in doing all of the work that a Retirement Committee does is across sort of the key threads that I think are very important and should be common among most plans, as well as the specific -- and when you talk about the lineup, the lineup is consistent with industry standards and practices among other asset managers like -- like the judge said.

Q. Okay. So let's go to DX 757.

This is a chart you prepared and I think you talked about in your direct. You're comparing participant rates -- excuse me, participation rates between American Century and other DC plans, right?

A. Yes.

Q. So this comparison is not limited to mutual fund companies or asset managers or anything like that, right?

A. Correct. This analysis was really to talk about the

participation rates among American Century Plans and to compare them to other data, yes.
Q. To all other retirement plans?
A. All other available in purple, and those with auto-enrollment in green.
Q. Great. DX 758, please.
So same thing here. You're doing a comparison between the American Century Plan and all other retirement plans for which data was available, right?
A. These are the deferral rates for the American Century and other DC and auto-enrollment 401(k) plans, yes. I should say yes first.
Q. And the universe that you're comparing this to is all other plans for which you had available information?
A. Yes.
Q. Okay. And then DX 759, please.
And now here, again, we've got a comparison of average plan balances between the American Century Plan on the one hand, and then all other retirement plans for which data is available, correct?
A. Yes.
Q. Okay. The only place where you're limiting the universe of comparators is when you're looking at the issue about proprietary funds, right?
A. Can you point to specifically where you mean?

Q. Well, your testimony that it's consistent with industry standards to limit the Plan only to proprietary funds, there you're limiting your universe not to all retirement plans, just to retirement plans of asset managers, right?

MR. FLECKNER: Objection. She just explained this.

THE COURT: I'm going -- I'm going to overrule your objection and allow it. If you want to answer, please do. Please answer.

A. So with respect to the fund manager selection, that's correct. However, with respect to the asset allocation and diversification of the plan, that's consistent with broad industry standards. So I guess the short answer is it depends on what aspect you're speaking about.

Q. For the asset allocation aspect of your opinion, you're comparing it to the broader retirement plan universe in general, right?

A. Yes.

Q. And then for the fund manager component of that -- and that's where we get the all proprietary lineup -- there you're limiting the universe you're comparing to to other fund managers, right?

A. Yes. And I just want to say the process for this Retirement Committee selecting and overseeing and maintaining the set of investment strategies, American Century investment strategies in their Plan, the process is being compared to all

plans and industry standards and practices.

Q. And I think we've seen other evidence in this case that there are no other retirement plans with more than 250 million in assets that are comprised exclusively of American Century funds. Do you have any evidence that would contradict that?

MR. FLECKNER: Objection.

THE COURT: Sustained.

Do you know -- not whether you have any more evidence. Do you know if there are any other retirement plans with more than $250 million in assets that are comprised exclusively of American Century funds?

THE WITNESS: I do not know.

THE COURT: Okay. How are we doing? Are we about ready to wrap this up? One more question.

MR. SPECHT: Well, couple questions, last topic.

THE COURT: Okay. You put this one up.

MR. SPECHT: One topic. I don't have a question count, but it's short.

THE COURT: Okay.

Q. All right. So when you were at the Office of the Fiduciary Advisor at State Street, I think you've already testified to this, part of your job was advising ERISA plans with respect to managing their investments, right?

A. Yes.

Q. Okay. And then another part of your job was actually

working as an in-house consultant for the defined benefit plan at State Street; is that fair?

A. I did not say it that way.

Q. You didn't say it that way, but that's true, that you were an investment advisor for State Street's defined benefit plan, correct?

A. It's technical, right? So investment advisor is one thing, SSGA was an investment advisor to State Street's plan. I in the Office of Fiduciary Advisor did advise State Street's DB and DC plan on occasion, right.

Q. Your team served as one of the advisors to the defined benefit plan at State Street, correct?

A. Yes.

Q. With regard to the defined contribution plan at State Street, the Committee had a separate consultant for that plan, correct?

A. They did. And they asked us to provide services, periodically to look at and provide them with insight on the lineup and other assorted things.

Q. Right. You gave input and provided other information with regard to the defined contribution plan, right?

A. That's correct.

Q. But for that plan, there was a separate consultant?

A. That's correct.

Q. Okay. And I think you mentioned yesterday in your

testimony that the State Street plan uses primarily proprietary funds; is that right?
A. Yes. All but one.
Q. All but one. And the State Street plan also uses primarily index funds, correct?
A. I don't know the answer to that question. When are you talking about?
Q. How about 2016?
A. I don't know the full lineup of the options.
Q. How about 2013 when you were working there?
A. I don't remember the full lineup.
Q. You remember there was a lot of index funds in that plan, right?
A. I remember there are index funds in that lineup, yes.
Q. And, in fact, it's almost entirely index funds. Do you remember that?
A. I don't.
Q. Okay. Do you remember the --
THE COURT: That was already asked, that question was.
Q. Do you remember that there -- well, let me ask you a broader question. So you also talked yesterday I think about the TSP, the Thrift Savings Plan. You're familiar with that plan?
A. I did not talk about that.

Q. Okay. May ask you a different question. You're familiar with the Thrift Savings Plan?
A. I am.
Q. Okay. And the lineup in that plan, you're familiar with that?
A. I am.
Q. Okay. The State Street plan, the lineup in the State Street plan is very similar to the lineup in the Thrift Savings Plan, correct?
A. If you say so.
Q. You haven't looked at the --
THE COURT: Hold on. Hold on. Hold on.
THE WITNESS: So the TSP -- I don't know the TSP well, and I don't know the State Street plan, per se, depending on when he's talking about.
THE COURT: So you can't really give an opinion if they're similar?
THE WITNESS: Correct.
THE COURT: Okay.
Q. The way that you would be able to find that out would be look to the Form 5500s for the State Street plan, right?
MR. FLECKNER: Objection.
THE COURT: Sustained. Please -- please move along. I mean, she doesn't know the answer.
MR. SPECHT: Well, she does give in her report a

bunch of information about other plans based on --

THE COURT: She doesn't know the answer to that question. She's unequivocal about that.

MR. SPECHT: No, I understand. It's a different question, though, Judge. The question I'm asking is to get the answer, to find the information, the place to look is the Form 5500.

THE COURT: But is that important to us today? Because we've talked about 5500s for -- how many days have we been doing this now?

MR. SPECHT: How about this, Judge?

THE COURT: Have we been doing this 10 days? Eleven days?

MR. FLECKNER: Ten.

THE COURT: Ten days. And I feel like I'm in a loop a little bit.

MR. SPECHT: If you let me ask that question, Judge, it will be my last one.

THE COURT: You found my weakness.

MR. SPECHT: I thought so.

THE COURT: All right.

Q. All right. Ma'am --

THE COURT: If she knows the answer. I don't know if she knows the answer.

MR. SPECHT: If she doesn't know, she can tell me.

That's fine.

Q. So, ma'am, if you wanted to find out what the lineup is for the State Street retirement plan, one of the places you could look to get that information would be the Form 5500, correct?

A. Yes.

MR. SPECHT: Thank you. No further questions.

THE COURT: Thank you, Mr. Specht. Any redirect?

MR. FLECKNER: No.

THE COURT: Ms. Mann, thank you.

THE WITNESS: Thank you very much, Your Honor.

THE COURT: All right. Call your next witness. Mr. Nemser, welcome back, sir.

MR. NEMSER: Thank you, Your Honor. Your Honor, I have a quick housekeeping matter --

THE COURT: Yes, sir.

MR. NEMSER: -- maybe before I call Dr. Strombom.

THE COURT: Yes, sir.

MR. NEMSER: At the close of Dr. Pomerantz's testimony, plaintiffs offered their Pomerantz demonstratives as exhibits, and I offered mine at that time too. And I had no objection to theirs if mine came in. And you said that you wanted to take theirs because it was about to be their moment to rest, and you would take mine later. So --

THE COURT: Okay.

MR. NEMSER: -- I have now got them marked with DXs and everything, our exhibits. They're -- they're now DX 849 through DX 855. And those correspond sequentially to Pomerantz 1 through 8. I'm sorry, 1 through 7 it is. And so I offer those.

THE COURT: Any objection?

MR. RICHTER: I don't think so, Your Honor. I haven't seen them with the stickers, but I trust Mr. Nemser as an officer of the Court.

THE COURT: All right. Why don't we admit them. If there's a problem, bring it to my attention, and I'll kick it out if we have to.

MR. RICHTER: Thank you, Your Honor

(Defendants' Exhibits 849 through 855 admitted in evidence.)

MR. NEMSER: And if I -- I understand the procedure is to move for leave to update the exhibit list, so I so move.

THE COURT: Thank you.

MR. NEMSER: Thank you.

THE COURT: Yes, sir. All right.

MR. NEMSER: Defendants call Bruce Strombom to the witness stand.

THE COURT: Mr. Strombom, sir, would you please come around this direction? And if you'll stop there, face our clerk, and raise your right hand and be sworn, sir.

BRUCE ALAN STROMBOM, DEFENDANTS' WITNESS, SWORN

THE COURT: Thank you, sir. And please have a seat. Good morning, sir.

THE WITNESS: Good morning.

THE COURT: Would you please begin by speaking your full name and spelling your last name for us?

THE WITNESS: Yes. Bruce Alan Strombom, S-T-R-O-M-B-O-M.

THE COURT: Thank you, sir. Mr. Nemser.

MR. NEMSER: Thank you, Your Honor. It will take me one second to get my equipment plugged in.

THE COURT: Sure. Is this the last witness?

MR. NEMSER: It is, Your Honor.

THE COURT: Okay. Well, we're really glad to see you, sir.

THE WITNESS: That's my sense.

MR. NEMSER: Almost there.

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. NEMSER:

Q. Good morning, Dr. Strombom.

A. Good morning.

Q. What's your area of expertise, sir?

A. I'm an economist.

Q. And we have a demonstrative related to your experience.

It's -- could you please call up DX 865, Chris?

And does this demonstrative accurately summarize your areas of expertise, your education, and your work experience?

A. Yes, it does.

Q. And so you have degrees from San Jose State and University of California, Irvine, in economics. Could you describe what -- what that entailed, and particularly emphasize any education you had that was relevant to the issues to which you are being to asked to testify in this case?

A. Yes. My degrees are in economics. I have a minor in business as well. I focused in economics in a couple of areas, finance and industrial organization.

Q. What is finance?

A. Finance is a study of financial assets and the markets in which they trade. So my Ph.D. pursuit in particular dealt with stocks and bonds, derivatives, foreign exchange, various financial securities and what's called modern portfolio theory, which is really how those assets are combined into portfolios in an efficient way, how investors evaluate performance of those securities, and -- and how they're combined in portfolios, like mutual funds or like the offerings in a 401(k) plan.

And in industrial organization, I focused on just the structure of industries in competition within industries,

and also did a significant amount of work in statistics and econometrics, which is essentially the application of statistics to answer economic questions.

Q. Where do you work now, sir?

A. I work at Analysis Group.

Q. And what -- what's your position there, and what do you do?

A. I'm a managing principal at Analysis Group.

Q. What do you do there?

A. I have some firm management responsibilities, but the bulk of my time is spent as a case leader, doing various types of consulting assignments for businesses, industry, and in litigation.

Q. And what is Analysis Group?

A. Analysis Group is an international economic finance and strategy consulting firm. We have about 900 employees throughout the world.

Q. How long have you worked there?

A. I've been at Analysis Group for 25 years.

Q. And how long have you been a managing principal?

A. Since 2003.

Q. And you've been working about 35 years?

A. Yeah. I've been gainfully employed for the last 35 years.

Q. And so in terms of the work experience that's shown on the demonstrative, do -- did any of that entail work that was

relevant to your testimony or the expertise that you're applying in connection with this case?

A. Yes. My whole career has been involved in economic and financial analysis. I began right out of school with working at the Tribune Newspapers West, a subsidiary of the Chicago Tribune. I was a financial analyst, focused on mergers and acquisitions and capital budgeting. So I did a lot of economic analysis of proposed investment projects for the Tribune company. I spent two years there.

I went to Price Waterhouse in their management consulting group, which was where I first became involved in litigation consulting and economic loss analysis. After a couple of years at Price Waterhouse, I went to a division of Citibank that was involved in mergers and acquisitions for middle market companies. I ran a valuation group there. We value about 500 companies a year. So I'm looking at financial and economic information for these companies and determining the value of their stock. Spent one year running a data processing company. And then I joined Analysis Group, as I say, 25 years ago and have been there since.

Q. So what's your understanding of what this case is about?

A. My understanding is the plaintiffs claim that the process by which the Retirement Committee operated was -- was one that was not prudent and that they didn't act with loyalty. And that as a consequence of that, the Plan participants in the

Plan suffered economic loss.

Q. So how does your experience, your education, your work experience, qualify you to testify in this case?

A. Well, my academic training certainly is in the area -- in the area of finance. And I -- I did my Ph.D. after joining Analysis Group. And specifically, I crafted my coursework in economics around what I plan to do for the rest of my career, which is study economic loss and damages. And that is what I have focused on at Analysis Group for the last 25 years.

The vast majority of my cases involve evaluating damages and economic loss, in some cases rebutting damage analysis, and in some cases affirmatively preparing damages analysis. But that's the sort of underlying theme of what I do is damage analysis across the whole range of industries and types of cases. So I do antitrust cases, securities cases, breach of contract cases. I basically apply the principles of economics and statistics to the question of economic harm and damages.

Q. And about how much of the work that you do at Analysis Group is related to the -- these issues of economic harm and damages?

A. It's the vast majority. I would estimate about 80 percent.

Q. And so you've been an expert in litigation before?

A. I have.

Q. About how many times?
A. I've testified at trial or arbitration about 35 times and at deposition another 80 or 90.
Q. And did the majority of the cases deal with issues of economic loss and damages?
A. They did.
Q. So what percentage of your litigation work has been defense side rather than plaintiff's side?
A. About 60 percent of my cases I'm on the defense side, and about 40 percent of the time I'm on the plaintiff's side. So it varies.
Q. Okay. And in terms of these economic loss issues and damages issues, has your work tended to be on one side or on the other?
A. No. I think it's roughly an equal split, a 60/40 split in damages, maybe even closer to 50/50 on damages in particular.
Q. Have you ever been disqualified as an expert by a court?
A. No.
Q. Has your testimony ever been dis-- excluded by a court?
A. I have one case in which I had a main assignment, and over the course of the case was asked to perform some probability calculations using data that had been collected by another expert through a survey. The judge decided not to admit the survey, and that portion of my testimony that related to using that data was not admitted. But to my knowledge, that's the

only instance.

Q. So the exclusion was related to the other expert's work?

A. That's right. And consequently, my -- my calculations, the data underlying them were not admitted. So mine were not -- not admitted as well.

Q. And have you ever had your testimony excluded based on improper logic or the improper application of economic principles?

A. No.

Q. How did you become involved in this case?

A. This case had been in -- Analysis Group had been involved in this case for some period of time. And at some point, the defense counsel asked one of my colleagues about potential damages and economic harm experts. And so I was introduced to the case at that time.

Q. And what was your assignment, in brief, in this case?

A. I -- I kind of had two assignments. Initially, I was retained to issue an expert report on class certification. So I evaluated the plaintiffs' proposed approach to the case from the perspective of class certification. And then subsequently, I -- I was asked to evaluate Dr. Pomerantz's report with respect to damages and economic harm.

Q. So you've talked about economic harm or economic loss and damages. Do you see a difference between those things?

A. I speak of those differently. And in my experience, there

is a difference. I think typically, there's a question of whether a plaintiff or group of plaintiffs experienced harm. So this is the fact of damages. Was there an adverse impact on the plaintiff. And --
Q. But the fact of harm resulting from some alleged misconduct, is that what it is?
A. That's right. So did the -- did the liability -- the legal theory of liability, does that translate into an actual economic harm to -- to the plaintiff? So it's a question of a fact of -- of harm. And that's what I generally mean by economic loss. And then damages is simply a question of quantifying that harm. So it's the quantum of damages. And damages can also extend beyond just the concept of harm. So things like unjust enrichment are sometimes a remedy that's available to a plaintiff. That's not actually a measure of economic harm to the -- to the plaintiffs, but it sometimes is a remedy. So damages is a bit of a broader concept.
Q. So your work here on the -- in the second assignment, to address Dr. Pomerantz's analyses of economic harm and damages, were -- were the methods that you used in evaluating and responding to Dr. Pomerantz's work the kind of work that you usually do?
A. Yes. I think this assignment and the work that I did is typical of the kinds of things I do routinely in my job for the last however long. So both the nature of the -- the

plaintiffs' damage model and my evaluation of that, my application of my economic training and experience is -- is typical of the kind of work that I do.

Q. So you were on familiar ground here?

A. Yes, I was.

Q. And -- and when did American Century retain you in this case?

A. I believe it was March of 2017.

Q. Are you being compensated?

A. Analysis Group is being compensated for my time on the case.

Q. And what's your hourly billing rate for your time?

A. $720 an hour.

Q. Okay. So you said -- still at a high level -- that you're opining on economic loss and damages. Are you also opining on whether the American Century Plan's Retirement Committee used a prudent or imprudent process?

A. No. That's not an area of -- that I'm opining on.

Q. Okay. So you said that your assignment included evaluating the economic loss and damages methodology of Dr. Pomerantz. What's your opinion about his methodology?

A. Well, I think at the very highest level, I think his methodology is inappropriate, and I think it's flawed. And the bottom line is that I don't think that it establishes any economic harm or economic loss to the plaintiffs. His

approach suffers from a number of deficiencies in my view.

I think -- you know, I'll list a few of those. We'll talk about those in details. But I don't think that his methodology actually isolates and measures the economic impact of the alleged breaches that are at issue in this case. I think that his measure of damages, I would say, is sort of contaminated by many other factors that are affecting this damage value that he calculates.

Secondly, I think in his analysis, the question that he's trying to answer or should be trying to answer is but for the alleged breach, what would have happened. And that translates into his model what would the Plan menu have looked like and what are the funds that would have been on the menu. In each of his models, he chooses a single answer to that question. It's always a comparison to one fund. And I think there's, in fact, a range of potential outcomes that could have resulted from a loyal and prudent process, assuming that the process in place was not.

Q. Let me stop you for a sec. We'll go back there.

A. Yes.

Q. But I -- before we -- we go into any more detail about flaws in his methodology, in your opinion, what should a proper methodology for determining economic loss and damages look like?

A. Well, there's a few principles in economic loss analysis.

And I think probably the leading principle or the first thing is whatever it is you're measuring as damages, whatever your calculation isolates as damages needs to have resulted from the alleged misconduct. So that's -- that sounds obvious, but in many cases, damage analysis actually measures something different. And I think in this case, they do measure something different.

The second idea is kind of a corollary of that. And that is that whatever you're measuring of damages has to be cleansed of any other kind of influence. So it should be these are really corollaries and they come to the topic generally of loss causation that this thing calling economic harm or damages has to be caused by the alleged mis-- misconduct.

THE COURT: Hold on one second. One second. Reggie, how are we doing?

THE REPORTER: Good.

A. And then, I guess, thirdly, that any damage model makes assumptions. So that's the nature of the beast. But those assumptions have to be made with reasonable certainty. There has to be a basis for those assumptions. They can't be speculative. They can't be arbitrary. Otherwise, you run into problems with the first two objectives that you're -- you end up measuring something that's not actually a result of the alleged misconduct.

Q. And is a good practice to make assumptions, at least the major assumptions explicit?

A. Absolutely. I think you -- you -- I mean, oftentimes, that's the problem with the damage analysis is there's an implicit assumption that's sort of baked into the -- the analysis. And it needs to be made explicit so that we can all agree that that's a reasonable assumption, that there's a reasonable basis for it.

Q. So did Dr. Pomerantz's analysis, did his methodology for calculating damages or showing economic loss, did they -- did that follow the principles that you just articulated?

A. No. I don't believe it did.

Q. Okay. So let's focus now specifically on Dr. Pomerantz's four damages models, which he labels Models 1 through 4 and he also has names for, which we'll get to. But when you evaluated his four models, what was your high level conclusion?

A. So at the -- as I say, at the highest level, I think he has an inappropriate damages methodology that contains many flaws and that the calculations he performs do not demonstrate that the plaintiffs in this case suffered any economic harm.

Q. So what do these models purport to calculate?

A. So his -- he has four damage models that I call the -- I think he may call these underperformance models. So he looks at four different alternative lineups for the menu and

calculates the difference between the Plan's actual assets at the end of the damage period and what he calculates the Plan assets would have been worth under his alternative menus. And the difference between those two things is what he calls -- he calls damages. I call that underperformance damages.

Q. So he's -- he's looking at the performance of the assets as they actually performed, and he's actually subtracting fees from there, right?

A. That's true. These analyses are net of fees. So when we talk about the performance of the actual investment, that's after fees are paid. When we talk about the performance of the alternative investments, those are also after fees.

Q. And then he's also doing a look at some but-for world you could say, the -- a menu that he's contending would have been in place but for the alleged misconduct, right?

A. That's right. At each --

Q. And he looks at what that performance would have been of that but-for menu and subtracts out fees from that side too?

A. He does. Yes.

Q. And that's -- those two performance minus fees, performance minus fees, that -- if there's a difference between them, that's -- that's what he calls damages?

A. That's correct, in those four underperformance models.

Q. Okay. So he was -- he was looking at this net performance, you could say, or performance minus fees, right?

A. He was. That's -- that's the -- the -- the quantity that he's studying.

Q. So is looking at that net performance alone the right way to make a damages calculation?

A. I don't think so. I think there are nonperformance attributes to these investments that have to enter the analysis in order for there to be, you know, a valid analysis.

Q. So it's not just this net performance, but there are other values. And we'll talk about those in more detail later, right?

A. That's right. I call them nonperformance attributes.

Q. Okay. Now, the four models are each intended to calculate the same type of damages, right?

A. That's right. This is -- this is four separate cuts at estimating the same thing. So these are -- you know, it's either one or two or three or four. They're not additive, but they're just four different ways of attempting to -- to calculate this -- this quantity.

Q. It will be double counting to pick one and three and add them up?

A. Yes. It would be.

Q. And that's true of all -- all four of them. You have to pick one?

A. That's correct.

Q. Okay. So is there a common methodology that Dr. Pomerantz

used to design the menus, the lineups of funds in his models?
A. No. I don't think there is a common methodology. I think each of his models was motivated by, you know, a different idea. So I find that there's not a common methodology for or motivation for him to select the -- the four alternative menus.
Q. Okay. So you've said that there are flaws, that you have identified flaws in his models?
A. Yes.
Q. And did you make a demonstrative that summarizes those flaws?
A. I did.
Q. And call DX 867, please.
So could you please take us through this slide, and just briefly describe what you intended by each of these seven characteristics?
A. Yes. So I'll start with the first one. Damages in the models are not attributable to the alleged defects. I think the -- there are many examples of this. I think Model -- his Model 4 is -- is an example. The motivation for Model 4, as Dr. Pomerantz described it, was to faithfully implement the recommendations of the Hewitt study.
I -- I think if we look at the Hewitt study and look at the alternative menu that was constructed, there is a lack of connection between what was actually recommended or

suggested in the Hewitt model and the changes that are reflected in the alternative menu.

So as a consequence of that, when he calculates damages as the difference between the actual menu and his but-for menu, he's calculating damages on a lot of fund combinations that are on the new menu that aren't really responsive to the Hewitt report. So I think that's an example of what I mean by the -- the alleged -- the damages that he calculates aren't connected to the alleged breaches or result from the alleged breaches.

Q. What is the second item here, differences in returns are not statistically significant? And, again, brief -- brief description of what you had in mind.

A. Sure. When -- when an economist looks at a series of returns or two values or a coefficient from a regression, just the scientific method applied to economics, the first question you ask is is there actually a difference between these two values? And so in the case of securities returns, any two securities are going to have a different series of monthly returns over whatever period we're looking at them.

Q. So what do you mean by returns?

A. So I'm talking about the monthly returns on any particular investment. So I -- I have an investment. It goes up 2 percent one month, it comes down 1 percent the next month. And if it's my investment, it probably goes down 4 percent the

next month and what have you. So that's a series of returns. It's affected by a lot of information that hits the market, how the -- exactly what comprises the investment. But these statistical -- these returns, because they're going to be different for any two investments, you have to ask the question as an economist, are these differences large enough that they're just not random chance. Can they be explained by random chance, or are they significant enough, large enough that there's really some underlying difference in the investment? And as an economist, if you can't rule out that this is just -- this result I'm getting is just by chance because of the inherent volatility in returns, then you can't make the next step, which is to say, well, the difference I'm measuring is a result of alleged misconduct because it could be just random chance that causes the difference.

Q. So if you're looking at returns from two different funds and -- those returns are going to go up and down because of market fluctuations is what you're saying, right?

A. Market fluctuations and a lot of other things that just cause randomness in returns for financial assets.

Q. Okay. And so when you see a difference between the two returns, you've got to ask yourself, are they real? Is that what you're saying?

A. That's essentially the question. Is there something fundamental going on here, or is this just small enough

differences that this is random statistical -- we call it statistical noise, but it's just results from the randomness of the returns.

Q. Okay. And we'll -- we'll come back to this. But you tested for this statistical significance issue, right?

A. Yes, I did.

Q. Okay. So what's -- what's the third item here, single but-for alternative is inappropriate?

A. So I -- I started to mention this. I think the -- the exercise we go through here is -- and Dr. Pomerantz goes through is if -- but-for the alleged conduct, if we put ourselves back in time, what would this menu have looked like? And that translates into what are the prudent options, prudent alternatives that might have been selected from a loyal and prudent process?

Dr. Pomerantz himself demonstrates, because he oftentimes chooses more than one alternative if you look across his four models, and I think he testified on direct that there's a whole range of possible prudent alternatives, yet in his calculations, he's choosing only one of those alternatives among a range of potential prudent and loyal alternatives. And the damage calculation that -- that matters to damage calculation which particular alternative you pick, if you're only going to pick one alternative. It's essentially arbitrary if we have a range of potential prudent

investments and I choose one of those, I need a reason why I'm choosing it, or, alternately, I can look at a range of potential outcomes that could have resulted from a loyal and prudent process.

And so I think that's a fundamental problem with his analysis. And, as I say here, he's choosing a single but-for alternative, which I think is inappropriate.

Q. So in any given model, Model 1, Model 2, Model 3, Model 4, he's mapping one actual Plan fund into just one other fund which he's picked for his -- his menu for that model, right?

A. That's correct.

Q. Okay. And then what's the fourth item here, inconsistent results across models?

A. Well, if you -- he's attempting to calculate the same sum, damages, across four different methodologies. And I find that his results are inconsistent across his four models. At the fund level, he has many times there's, you know, large damages in two models and no damages in the other models or just inconsistent results across the four models. And I think that is a red flag to a damages expert that if you're attempting to calculate the same quantity and approaching it from different angles, if you're getting different answers depending on which model you're using, that suggests that maybe your model is arbitrary, and maybe it's -- there's not a statistically significant difference between the performance. So it's

indicative of a problem. And I think we see that in Dr. Pomerantz's results.

Q. Okay. And then you have an entry here, alternatives have different risk profiles. So what's that one referring to?

A. So a risk profile is just kind of a shorthand way of saying that an investment has exposure to different elements of risk. So these are things like small stock versus large stock, domestic market versus foreign market, growth strategy versus value strategy. There's a lot of dimensions that cause investments to have different risk profiles.

And if you're comparing the at-issue fund that has a particular risk profile to an alternative that has a completely different risk profile, what you're likely measuring if you're looking at the difference in performance is really just the difference in the risk profile of the two alternatives that you're looking at. And that may not have anything to do with the alleged misconduct. So if you're mapping a fund that has a narrow strategy into a fund that has a much broader strategy, there's going to be a difference of return there. And that may have nothing to do with the breach. And I think in --

Q. So -- so to take an extreme case -- sorry to interrupt, but if your -- the real fund in the Plan were a stock fund, and you'd mapped it into a bond fund, and you were trying to figure out whether the difference in performance between the

two was caused by misconduct, the -- the differences between the stock performance and risk attributes and the bond performance risk attributes could very well be driving it and the difference, you know, would -- would have shown up anyway, regardless of the misconduct?

A. That's -- that's the basic idea. That's an extreme example. But that's -- that's exactly what -- what I'm talking about with this --

Q. Okay.

A. -- issue.

Q. Great. So then you have here that the models ignore the nonperformance attributes of the at-issue funds. You gave us a sentence about that a minute ago, but give us two more sentences if you have --

A. So -- so the nonperformance attributes of funds include things -- and I think in this case principally the idea that actively managed funds are different and have different attributes than -- than passively managed funds or index funds. People invest in actively managed funds for reasons that are different than the reason you invest in a passively managed fund. There's different strategies that can be implemented in active funds. And we'll talk about it in detail.

But that's an example of nonperformance attributes that -- that investors value that can affect the relative

performance of an investment in an up market or a down market differently. And the analysis of damages has to take into account these nonperformance attributes, in my opinion. And I don't think Dr. Pomerantz -- or I know Dr. Pomerantz's analysis does not.

Q. So what would be -- very quickly, what would be an example of an active fund being sort of addressed to the possibility of a down market?

A. Yeah. There are -- there are strategies in actively managed funds that can be characterized as conservative in the sense that in an up market, we know those passive funds -- or active funds are designed in a way that they're going to underperform the benchmark or an index fund. But on the other side, in a bear market, those funds are going to hold up better than -- than an index or a passively managed fund. And so investors know that. If there's an up market and you have an investment in a conservative fund, you -- you're not surprised that that fund is not doing as well as another passive fund in the same investment style that you might be able to point to. You're not holding it for that reason. And if your analysis doesn't account for that fact, you're going to, as Dr. Pomerantz does, calculate damages on that type of a -- of a match when that's not -- that's not a source of economic harm to participants, and it may not even be unexpected.

Q. Okay. And the last item you've got here is asset mapping reduces choice and ignores participants' preferences. And this is a characteristic I think that you said you've seen through all these different other flaws.

A. Yeah.

Q. What did you have in mind?

A. Yes, I -- what I'm trying to summarize here is that the participants in the American Century Plan have certain preferences that are apparent from the types of choices they're making between active and passive funds in the PCRA, for example, and preferences for American Century funds, which is evident from the funds that they invest in when they have options for other alternatives.

Dr. Pomerantz essentially ignores those. In several of his models, he completely replaces every fund on the menu with a -- with a whole new lineup. But he makes the assumption that people are going to invest the same amounts, they're going to invest in exactly his replacement fund and leave their money there, and invest the exact same way as he sort of prescribes in his new menu. And I think that's a -- that's a very unrealistic assumption, particularly in some of the instances where the -- the fund that he adds to the menu really is a completely different type of fund than he's replacing in the -- in the -- among the at-issue funds.

Q. Okay. So do all of the models, Models 1 through 4, suffer

from some of these flaws?
A. Yes. I think many of these flaws apply to all models. And every one of his models has multiple -- multiple of these flaws that apply, in my view.
Q. So if we could go to DX 868, which is isolating the first one, which you -- you gave a brief account of. And so with respect to this issue about damages in models not attributable to the alleged breaches, you -- you mentioned Dr. Pomerantz's Model 4, his -- his Hewitt model. Did you evaluate that model and his methodology?
A. Yes, I did.
Q. Okay. And what did you find, briefly?
A. Well, the -- the brief summary is that there is -- I think the alternative menu that he proposes in Model 4 is really untethered to the recommendations in the Hewitt report that the lineup that he ends up with in his Model 4 doesn't flow from the Hewitt report. It's -- it's -- it's based on his -- whatever it is that he connects the dots in order to come up --
Q. Well, he said he was faithfully implementing the recommendations in the Hewitt report. That's what he said in his report, right?
A. That's right, that his effort in Model 4, the motivation was to faithfully implement the recommendations in the Hewitt report. And in my view, I don't see the connection between

the Hewitt report and the alternative model that he's proposed here. And I think Dr. Pomerantz testified that somebody else might look at the Hewitt report and come to a different conclusion about what the model might look like. And I would agree with him in that respect.

Q. You -- you were in the courtroom when Dr. Pomerantz testified?

A. Yes.

Q. You heard when I questioned Dr. Pomerantz about his statement that the Hewitt model faithfully implemented the recommendations of Hewitt?

A. Yes.

Q. And I took him through the Hewitt report, right?

A. Yes, you did.

Q. And did seeing that testimony affect your opinion regarding Dr. Pomerantz having a flawed methodology in his Model 4?

A. It didn't affect it. I think, if anything, it strengthened it.

Q. Okay. Can you give an example of how, in your view, Model 4 fails to reflect what's in the Hewitt report?

A. Well, there -- there are many, but I think gold --

Q. Maybe two. Maybe two.

A. Okay. I think the gold fund is -- I know there's a lot of discussion with the gold fund with respect to the Hewitt

report. But in my view, the Hewitt -- the reading of the Hewitt report is -- does not indicate that the gold fund must be removed, and also that -- that it should be replaced with the American Century Global Growth Fund. So that's an example of a change to the menu -- in this case, a very important change to the menu that I don't think flows from the Hewitt report.

Q. And one more example.

A. Another example is the replacement of the money market fund with the stable value fund. That's another example of a change to the menu that has a material effect on the damage value for Model 4, but which doesn't flow from the -- from the Hewitt report.

Q. So -- so, Dr. Strombom, were you here in court when Dr. Pomerantz testified that the Hewitt report stated that other plan fiduciaries do not use specialty or sector funds?

A. Yes.

Q. And he was including the gold fund as a -- as a specialty fund, right?

A. That's correct.

Q. Okay. Was that a true statement about the Hewitt report?

A. No. I think the Hewitt report explicitly shows that specialty funds are actually on the menu of other 401(k) plans.

Q. Could you please call up JX 10, page 17?

So this is a page from the Hewitt report, which you pointed me to and was part of my questioning of Dr. Pomerantz as well. What do you see on here which is inconsistent with Dr. Pomerantz's statement about plans not having specialty funds on their -- their menus?

A. Well, in this particular exhibit, down towards the bottom, there's a row labeled Specialty/Sector funds. And this exhibit indicates that 8 percent of the plans that were surveyed by Hewitt offered a specialty or a sector fund. And then just below that, you also see the line called REIT, which is real estate investment trust, which is actually any type of specialty fund. It's a sector fund that invests in real estate. 19 percent of the surveyed plans apparently had that option on their menu. So this is consistent with -- or inconsistent with the idea that specialty funds are not on the menus of 401(k) plans.

Q. Well, when I asked Dr. Pomerantz about the -- the bar for REITs, he said that REITs are a different animal from a mutual fund in real estate equities or in REITs, right?

A. Yes, he did say that.

Q. So do you think that's right? Are they different?

A. Well, I mean, they're different in the sense that a REIT has a specific legal structure, and a mutual fund that invests in REITs, like the American Century fund, is a mutual fund. But from an economic perspective and a financial perspective,

the issues is -- are -- are plan participants gaining exposure to the real estate sector with this type of investment. And, I mean, there's no -- there's no question that they are. And so there's no practical difference between a REIT and a mutual fund that invests in a REIT for purposes of this case.

Q. And do you have any view on what Hewitt's interpretation was of whether it -- this bar related to REITs was intended to include the American Century Real Estate Fund?

A. Yes. The column on the far right of this exhibit shows where Hewitt indicates with a check mark if American Century has a -- an offering on their menu that falls into each of these categories. And as you can see, in the REIT category, there's a check mark for American Century. So it's pretty clear that Hewitt categorized their -- the offering of American Century, or the menu option, as being within this category that they're calling -- calling REITs.

Q. And it was -- 19 percent of the plans that Hewitt surveyed had one of these REITs, which could include a real estate fund just like American Century's, right?

A. That's correct.

Q. Okay. So I know we've seen this many times, and we'll go quickly through it. But could we go to page 5 of the Hewitt report. So this is the Executive Summary, and it's entitled Recommended Considerations. In your view, do any of the recommendations mention the gold fund or the money market fund

or constitute a recommendation that the gold fund, the Global Gold Fund or the American Century Money Market Fund should be removed?

A. No.

Q. And now let's look at page 24, please. There's a section here called Suggestions in the middle of the page.

A. Yes.

Q. And again, do any of those suggestions mention the gold fund or the money market fund or constitute a recommendation or a suggestion that those funds be removed from the Plan?

A. No.

Q. So how does Dr. Pomerantz's replacement of the American Century Global Gold Fund with the American Century Global Growth Fund, which -- what it was replaced in, if I'm right, how did that impact his damages calculation?

A. In Model 4, that single substitution represents about half the damages in Model 4. It's something greater than $14 million of about $29 million in damages in Model 4, according to Dr. Pomerantz.

Q. So I just said -- I should have asked you first about the Global Gold Fund being mapped in Model 4 into the Global Growth Fund, right?

A. Yes.

Q. Are those similar funds?

A. No. They're -- they're completely different funds. Gold

fund is a specialty fund. It invests in the equities of gold mining companies internationally, or globally. The American Century Global Growth Fund is a widely diversified nonsector equity fund that -- that invests in -- in a global portfolio of equities.

It's an example that we'll talk about later of two options that have completely different risk profiles. They're completely different objective -- investment objectives. And what we're really measuring in the damage number that Dr. Pomerantz calculates is just the difference in performance between those two, you know, completely different investments.

Q. So from the viewpoint of an -- of an expert in economic loss in damages, did -- was there something wrong with mapping this American Century Gold Fund into a comparator in a different asset class?

A. Yes. I think the -- what we're -- what we're measuring in -- or what Dr. Pomerantz is measuring in this case is just the difference in the performance between these two sectors in the particular market that we happen to have, which was -- which was an up market for equities and a down market for gold. So it's -- it's a -- it lacks -- it's not connected to -- to the breach, in my view. And it's -- it's an erroneous assumption about what would have happened in the but-for world if the gold fund had gone away. If the gold fund had gone away, would all this money have flowed into this

completely different type of investment? It seems highly unlikely, but that's the only kind of mapping that Dr. Pomerantz's model will accommodate. And so I think it's -- it's a deficiency in the model, and it doesn't measure what Dr. Pomerantz should be measuring.

Q. And in -- is -- is a Morningstar category an example of -- at least a comparison or a categorization that one could try to use at least in the first instance to distinguish between different asset classes?

A. Yes. I think Morningstar category, Dr. Pomerantz uses that in other of his models to identify comparable funds or his alternative funds. I think it certainly is a component or piece -- it's a good place to start when you're thinking about is one fund comparable to another one, is it an alternative investment, to look at funds that are in the same Morningstar category.

Q. So very briefly, because I know this has been touched on in places, but just to be sure we're all on the same page, what's a Morningstar category, from your point of view?

A. Morningstar is -- is an independent company that looks at mutual funds and other types of pooled investment options and evaluates their -- their strategy, the types of assets they hold, and puts those assets into a range of categories of similar and comparable types of investments.

And so the categories are fairly broad. There still

is a lot of diversity within a category. But as a first cut, it's a -- it's a reasonable way to think about funds that may be comparable.

Q. And did you analyze the Morningstar categories of the funds that are on the Plan's actual menu and then Dr. Pomerantz's model for comparators?

A. I did.

Q. If we could call up, please, DX 807.

THE COURT: Mr. Nemser, we're about ready for a recess. If you're close, I'll let you finish. Otherwise, we might take one now.

MR. NEMSER: I think we should stop now, Your Honor --

THE COURT: All right. Thank you.

MR. NEMSER: -- because we're about to enter into the discussion of this.

THE COURT: We'll take a one hour -- and you may have to loop back and tell me what we just talked about.

MR. NEMSER: Sure.

THE COURT: And I'm using the word looping in a positive way there, Mr. Specht. Thank you.

MR. NEMSER: Thank you.

(Recess at 12:00 until 1:04 p.m.)

THE COURT: All right. Mr. Nemser.

MR. NEMSER: Okay. Your Honor.

THE COURT: Please proceed, sir.

MR. NEMSER: I'm going to step back a couple of questions and just run them quickly.

THE COURT: Thank you.

Q. So Dr. Strombom, you were talking about the lack of similarity between the Global Gold Fund and the Global Growth Fund and attributed that, at least in part, to the fact that they were from different asset classes; is that right?

A. That's correct. Different Morningstar categories I think we were talking about.

Q. Right. And we -- we went from different asset classes as a broader term to --

A. Yes.

Q. -- specifically one way of classifying assets, which is Morningstar categories?

A. Correct.

Q. And I think you said it was a first cut at figuring out whether things are in the same asset class or not?

A. Yes.

Q. And could you give, maybe in a little briefer form, what a Morningstar category is?

A. Well, just generally, Morningstar breaks up the market and sort of develops these large buckets that have similar types of assets, investment strategies, market capitalizations, and is able to create these categories and then assigns particular

mutual funds or other investments to a particular category that -- that best represents what their basic investment strategy is.

Q. And I asked you from the viewpoint of an expert on economic loss and damages, is there potentially something wrong with mapping from one Morningstar category fund into a different Morningstar category fund? Again, give me a briefer answer.

A. Yeah. Briefly, yes. If you're mapping from one Morningstar category into another Morningstar category, it's likely that you're going to have a difference in the performance between those two funds that's just a result of the fact that they have different risk profiles, they have different investment strategies. And that -- that may or may not have anything to do with the breach that you're attempting to address, or it may not represent how -- an appropriate representation of the but-for world.

Q. And you did a demonstrative that was actually part of your report that compared the Morningstar categories of the funds that were actually in the Plan menu with the model for alternatives, Dr. Pomerantz's comparators that he chose, right?

A. That's correct.

MR. NEMSER: Okay. So, Chris, if you could bring up DX 807.

THE COURT: Does somebody need a cough drop over there? I have plenty of cough drops.

MS. GALLAGHER: I'm good. Thank you.

THE COURT: Okay. Thank you.

Q. And so this goes on for many pages, right?

A. It does. I think four.

Q. We're looking at the first page. And that's where we'll stay for a while. So tell us briefly what's in the left column and what's on the right side and what's going on here.

A. So this is an attempt to look at these -- the actual fund, the at-issue fund, which is on the left here, and the Pomerantz alternative, which is on the right, and ask the question, are these -- are these two funds in different investment categories, different Morningstar categories, and, therefore, are we going to see a difference in performance that's just a fact -- a result of the fact that they're different types of investments.

And so I list there on the left the at-issue funds. In the fourth column over, I show the Morningstar category. And then I list Dr. Pomerantz' alternatives and the Morningstar category that the alternative is in. And in the far right-hand column, if there's a difference in the Morningstar category between the at-issue fund and Dr. Pomerantz's fund, I indicate that with an X.

Q. So -- so let's start with the one at the top, Capital

Preservation Fund, on the left, that's the one from the Plan menu?
A. That's right.
Q. The at-issue fund?
A. That's right. So the at-issue fund is the American Century Capital Preservation Fund, had about $3 million in assets. It's categorized by Morningstar as a money market fund. It's in the money market category. Dr. Pomerantz takes those assets that are in the -- the money market fund, eliminates the money market fund, replaces it with a stable value fund. And as you can see, the stable value fund Morningstar categorizes differently. It categorizes it as a stable value fund in that stable value category. So this is an instance where we're -- Dr. Pomerantz is replacing a fund in one category with a fund that's in a different category.
Q. Okay.
A. And there's an X in --
Q. And the X in the right-hand side indicates that they're in different categories?
A. Correct.
Q. Okay. And then if we go down further, we can see Global Gold and the Global Growth, right?
A. That's right.
Q. So where are those? That's line 11, I think.
A. That's right. So if we look just at line 11 there, the

American Century Global Gold Fund, that's categorized by Morningstar as an equity precious metals. There's a separate category called equity precious metals in Morningstar. That's being replaced by the American Century Global Growth Fund, which is a different category. It's a world stock category. So again, there's an X in the right-hand column, indicating that there's a -- you know, there's a difference in -- in asset category and in the mapping that Dr. Pomerantz does.

Q. So you have a highly specialized fund focused on stocks of companies that are involved in the precious metals business on the gold side, right?

A. That's correct.

THE COURT: And this is where you pointed out that that made up half of the damages associated with this model, is that --

THE WITNESS: That's correct. That's a little over $14 million out of about $29 million is -- is just right there on line 11. And similarly, on -- on line 1, that represents about $5 million in damages. That's the -- the replacement -- well, I guess there's actually a couple of money market funds. So the replacement of money market funds, of which there are two, with a stable value creates --

THE COURT: His assessment of damages attributed to these are not listed on this particular --

THE WITNESS: Not on this line, no.

Q. But -- but together, if you took the $5 million on stable value -- and we'll come back to stable value in Model 4 for a couple minutes anyway -- and you added that to the 14.6 million for the gold fund, just those two alone are accounting for 20 out of 29 million roughly?
A. That's correct.
Q. And you can see on the right-hand column that just even on this first page, there are some number of Xs, so these ones that don't match up in terms of the Morningstar category?
A. That's correct. I think there's six on this page.
Q. Yeah. And so if we could go, Chris, to the last page of this one.
What is -- Doctor, what does this show in terms of the totals that you found?
A. So this is the summary. And it shows that, in total, Dr. Pomerantz replaced 35 funds with different funds. And in 25 of those instances, there was a mismatch in the category between the at-issue fund and the fund that he -- he mapped it into. So that's over 70 percent of the -- the funds that he selected where he selected a different fund than the actual American Century fund, we have this potential problem.
Q. So in Models 1 and 3, he mapped on -- on the Morningstar categories, right?
A. That's correct. I think 1 and 3, he used that as the basis of identifying an alternative fund.

Q. But in Model 4 -- and later, we'll get to Model 2 -- but the same issue, in Model 4, 70 percent didn't get mapped into the same Morningstar category?
A. That's correct.
Q. Okay. And I'll move the admission of DX 807, this chart, into evidence.
THE COURT: Any objection to 807?
MR. ENGSTROM: No objection, Your Honor.
THE COURT: All right. Thank you, Mr. -- Mr. Engstrom, you're leading the charge here obviously?
MR. ENGSTROM: That's right.
THE COURT: All right. Thank you.
(Defendants' Exhibit 807 admitted in evidence.)
Q. And so just briefly on the -- the money markets, I've asked you already whether Hewitt recommended or suggested removing money market funds in your view of the Hewitt report?
A. That's correct. I don't believe they did.
Q. Okay. And I haven't asked you as such, did Hewitt recommend or suggest adding a stable value fund to the Plan menu?
A. No. I don't believe they did.
Q. Okay. So, Chris, if we could go to DX 869, please.
The next, Doctor, of your seven flaws that you pointed out at the beginning was the difference in returns not statistically significant. So -- and you testified -- when I

asked you, did you evaluate the statistical significance of the differences between the performance of the at-issue funds and Dr. Pomerantz's alternatives in his various models -- and now we're not just talking about 4, we're talking about all of them. You said that you had looked at the statistical significance?

A. Yes, I have.

Q. Okay. And what did you find?

A. Well, I found that for the vast majority of replacements that Dr. Pomerantz makes, there's no statistically significant difference between the performance of the at-issue fund and the performance of alternative that he selects. And as I think we'll talk about, that's sort of a fundamental first step in a damage analysis is to ask that question.

Q. So why is it a fundamental first step?

A. When -- whenever we're looking at something that has variation, like a return on an asset like we're talking about here, there's various factors, market factors, industry specific factors, things that happen to a specific company in a particular fund's portfolio that are going to cause those returns to fluctuate over time. If you've owned any mutual funds, you know the value bounces around.

If we look at two alternative investments, there's different influences on each of those. And so there's -- there's movement or variation in the returns of these series

over time. And they're going to end up at a different place ultimately. So we know any two investments, if you hold them for six years, there's going to be some sort of difference at the end. And the question you need to ask is -- as a scientist and as a economist is, is that difference big enough that it's anything other than just chance that we happened to stop the clock here, and this is the difference because these things are fluctuating? Or, in the alternative, if you can -- if you can exclude that as a possibility and say, well, this difference in relation to how much volatility there is here, there's actually a big enough difference that we know these are -- these are behaving differently. It's only then that you can say, well, then that difference may be attributable to the alleged misconduct. And it's not just a -- just a random chance difference between the -- the two returns.

Q. And if you can't get to a level of confidence that, you know, you can rule out chance as the cause of the difference, where does that leave you in terms of thinking about damages?

A. Well, if you can't -- and this is a general proposition for economists and statisticians, econometricians, is if you can't rule out that the difference you're observing is just a random chance difference, then you certainly can't attribute it to any difference in conduct or to the breach in this case.

And in those instances, you have to set that observation aside and say I can't conclude that there's a real

difference here, and so I can't attribute that difference to damages if I can't rule out that it's just due to chance.

Q. So in brief, tell us how an econometrician or statistician goes out trying to rule out whether chance was the cause.

A. There's a -- there's a very basic test, the T-test, which is taught in usually first semester statistics. And it's a well-accepted test that's designed to test exactly this hypothesis, are the difference between these two values statistically significant and different? So that's the test that I use to -- to test this proposition.

Q. And so applying this T-test, what do you get? What happened?

A. Well, I -- I found that roughly 90 percent of these combinations, so for 90 percent of the at-issue funds that were mapped into alternative funds, 90 percent of those different -- differences were not statistically significant, using a standard 95 percent confidence level.

THE COURT: What -- what model are we addressing here at this --

MR. NEMSER: All four, Your Honor.

THE COURT: Just -- we're on 4 still?

MR. NEMSER: Yes.

THE COURT: Okay.

THE WITNESS: No.

MR. NEMSER: And we'll show you a result for each

model in just a second.

THE COURT: Okay. Go ahead.

THE WITNESS: He said all four.

THE COURT: All four.

MR. NEMSER: Oh, yeah. I'm sorry. I didn't say it loud enough.

THE COURT: Yeah. Keep me oriented on the model.

MR. NEMSER: Yes.

THE COURT: Okay. All four.

Q. So this one -- the statistical significance problem applies to Model 1, Model 2, Model 3 and Model 4; is that right, sir?

A. That's correct. Yes.

Q. Okay. And so let's look at DX 799, please.

So this is another exhibit from your report, right?

A. Yes. This is one of the -- the sexier exhibits in my report.

Q. Well, any time anybody sees mean difference and standard error, they get pretty excited?

A. I certainly do.

Q. So this one is called Statistical Comparison of Monthly Returns of At-Issue Funds and Pomerantz Benchmark Model 1. So this one is related to Model 1 alone, right?

A. That's correct.

Q. But you did one like this for each of the four models,

right?
A. That's -- that's right. There's 12 pages in this exhibit, and I assessed them all.
Q. Okay. And you don't have to get into all the technical stuff, but just tell us generally what we're seeing in here.
THE COURT: Before we -- before we start that. And I'm just -- I'm trying to make good notes here. So as we go through this list, the flaws in DX 867, there are six different points that this witness is trying to make. The first point is only attributable -- is it only attributable to Model 4? We're on the second point, differences in returns are not significantly -- or statistically significant. These are all to all four of them right? So --
MR. NEMSER: They are.
THE COURT: -- when we leave 1, the first point you make, damages in models are not attributable to breaches, is that just related to Model 4?
MR. NEMSER: Well, we used Model 4 as an example of the problem. And I should -- should let Dr. Strombom explain a little more --
THE COURT: Yeah.
MR. NEMSER: -- because it could potentially apply to all of them.
THE COURT: Okay.
MR. NEMSER: But Model 4, as I --

THE COURT: Right now, we're just talking about 4, right?

MR. NEMSER: Right.

THE COURT: Okay.

MR. NEMSER: And then this statistical significance one that we're on, that's all four models --

THE COURT: Yes, sir.

MR. NEMSER: -- for sure.

THE COURT: So that's -- that's a good framework for me to make notes on. So please go forward.

MR. NEMSER: Okay.

Q. Well, let me ask you, Doctor --

A. Yes.

Q. -- did you see problems of -- of fit between the alleged misconduct and the damages calculation that Dr. Pomerantz made in his other models besides Model 4?

A. Yes. I -- I think the -- the first problem, this lack of measuring the effect of the -- of the alleged breach is common across all four models. We just talked about Model 4 as an example, but I think it applies -- so, for example, in Model 1, if the issue is that there should have been passive options on the menu, for example. What Dr. Pomerantz does in Model 1, for example, is to substitute passive options for every at-issue fund. So all -- he just completely replaces all the active funds with all passive funds. That has a -- that's

like cutting your hand off because you have a cut on your finger. There's a lot of consequences to that kind of wholesale replacement that don't have anything to do with the alleged breach of not offering a passive fund, if that -- if that's an alleged breach. So I think that disconnect exists across all four models.

THE COURT: Very good. Thank you.

Q. And another question I'd have for you, Doctor, would be, you were in the courtroom when I asked Dr. Pomerantz about whether he had a model for -- related to -- to the Watch List and how long things were on the Watch List and when they were taken off the Watch List.

A. Yes.

Q. Do you recall that?

A. Yes, I do.

Q. And Dr. Pomerantz said that he didn't have a model that measured that, that he hadn't done any model that was timed to the addition or removal of things from the Watch List. Is that relevant to this question as well?

A. I think that's -- I do think that's right. I don't -- I don't -- his models address kind of a -- a patchwork of the alleged misconduct in not a systematic way. Some models don't address many of the alleged breaches, and others address the breaches in a way that's more than -- where there's more change than is needed to address the alleged breach. So I

think that's a general feature of -- of all of these models.

MR. NEMSER: Okay. So I think we can expand part one now to -- to cover all four models. But we're -- if Your Honor is okay with it, we can move on to the discussion of Model -- of part 2 here, the statistical significance?

THE COURT: Yes, sir. Please do. And please keep me posted on what we're covering so I can --

MR. NEMSER: Absolutely.

THE COURT: -- connect my dots.

MR. NEMSER: We'll do that.

Q. So I asked you, Dr. Strombom, to just tell us at a high level, without getting into technical stuff too much, what -- what's being shown here in this Exhibit 11?

A. Exhibit 11 is just -- is a detail for each of the combinations that are shown here. So the at-issue fund and whatever fund it is that Dr. Pomerantz replaces it with. And then on the right-hand side is simply the result of the T-test that I'm doing. And the critical column there is the P value. That's the value that you look at to determine if there's a statistically significant difference. In general, it's -- if it's less than .05, the difference is considered statistically significant.

And in this chart, I've indicated with an asterisk in the far right-hand column each of those rows that are statistically significantly different. So on this page, you

can see there's three of them that are statistically significantly different, which means that all of the others, the ones that aren't highlighted or don't have an asterisk by them, there's not a statistically significant difference between the returns of the at-issue fund and the returns of the Pomerantz benchmarks.

Q. So the apparent differences for all of those others, the ones who don't have the asterisk, they -- you could say right now they're not real. You can't rule out that they were caused by chance?

A. That's correct. They -- they could easily be attributed to just random chance.

Q. And did you make a demonstrative -- it's a little easier to deal with -- that summarizes your outcome for all four models?

A. Yes.

Q. Let's call up, please, DX 870.

And what is this showing?

A. So this summarizes the results for the four models of these statistical tests that I've done. So, for example, in Model 1 and Model 4, I find that 89 percent of the at-issue funds don't differ statistically from the replacements that Dr. Pomerantz identifies. And then in Models 2 and 3, it goes up to 91 percent of those -- those replacement funds' return does not differ statistically from the returns of the at-issue

fund. And consequently, those combinations, we can't attribute damages to them because we can't rule out that the difference is just a result of random chance.

Q. So for about 90 percent of the funds in each model, you can't distinguish the differences from chance. And so those -- those comparisons, those funds can't, from an economic or statistical standpoint, be generating damages; is that right?

A. That's correct. We can't attribute the differences to the alleged misconduct.

MR. NEMSER: So I'd like to move admission of both the previous one, which was DX 799, and this one we're looking at right now, DX 870.

THE COURT: Any objection to DX 799 and DX 870?

MR. ENGSTROM: No objection.

THE COURT: Thank you. Those will be admitted.

(Defendants' Exhibits 799 and 870 admitted in evidence.)

Q. So we can see here that there is about 90 percent that is not statistically significant, but what do we do with the others? Are there damages with respect to that other 10 percent or so?

A. That's -- that's a question. So what we can say about those is there is a statistically significant difference between the performance of the two that we've identified. And the question then is, well, is that difference due to the

alleged misconduct? And so because of -- it's like a gate. You have to first pass the gate of statistical significance. If you pass that gate, then you're in the realm of asking about why is there a difference between the two that we're observing. And, you know, in the proper damages model, the answer to that should be, well, it's because of the alleged misconduct.

I think in Dr. Pomerantz's model, there are many other explanations, including, for example, that the two alternatives are in different asset categories and that they have nothing to do with the alleged breach. So that 10 percent is just really eligible now for consideration as potential -- as potential damages, but there's more work to be done.

Q. So Dr. Pomerantz, did he do any statistical comparison of these differences?

A. No. He didn't -- he didn't take this -- the step of testing for statistical significance of the differences that he calculates.

Q. And did he, therefore -- it's going to follow that he didn't, but did he do an analysis that was limited to the 10 percent where there was statistical significance?

A. No. No, he didn't. And -- and he incorporated all of this statistical noise, as we would call it, for 90 percent of these pairings into his damage number. And they shouldn't be

in there.

THE COURT: So that's a -- that's the phrase you would use when you look at Model 1 and say 89 percent, that's 89 percent statistic -- statistical noise? Is that what --

THE WITNESS: It can be explained by statistical noise or just chance. You can say chance. But statisticians like that term statistical noise, which just recognizes that these returns fluctuate, and you have to make sure that the differences is large in relation to the fluctuation of the underlying returns in order to make a conclusion about damages.

Q. It's kind of like static on the radio?

A. It is, yeah. That's why they call it noise. It's just kind of in the background going on and...

Q. Okay. And so what -- what's an example of one of these problems that you would have -- once you get past the first gate, you've got to do this other analyses you're saying, right?

A. Yes.

Q. And so what's an example of one of these instances where there's a mapping problem of some sort with respect to one of those ones where there is a statistically significant difference?

A. Yes. So the -- for example, one of the differences that's statistically significant -- there's many examples. One is

the money market fund to stable value fund. That line is generally statistically significant. And it should be no surprise that it's statistically significant. Those are in different Morningstar categories. They have different risk and return profiles. And the differences are sufficient that they're a statistically significant difference. If you don't believe that it's, per se, imprudent to have a -- to have a money market fund and if you don't think it needed to be replaced by a stable value fund, then that premise is -- or the thing that's driving that difference is -- is not a breach. If you don't think that's a breach, then that shouldn't be included in the damage calculation.

THE COURT: Is that unique to Model 4, that mapping?

THE WITNESS: No. That is across all four models.

THE COURT: Okay. Okay.

THE WITNESS: Yeah. That's right.

MR. NEMSER: This is the one, Your Honor, where he incorporates that mapping in Model 4, but he does a separate calculation for Models 1 through 3 where he makes a similar mapping.

THE WITNESS: That's correct.

THE COURT: Okay.

THE WITNESS: That's right. His -- his stable value damages is only baked into Model 1 -- Model 4, excuse me. Yeah.

Q. Right. Okay. So let's move on to the third of your items. And, Chris, if we could go to DX 871, please.

So this is the one about the single but-for alternative being inappropriate?

A. Yes.

Q. And so what do you -- what do you have in mind there?

A. Well, just to take a step back, what -- what Dr. Pomerantz is doing or any damage expert should be doing is saying we know what happened in the actual world, we know the conduct, and we know the outcome. If we step back into the but-for world and say, well, instead of what the Retirement Committee did, if they had done what the plaintiffs contend they should have done, what would have happened? What would the world have looked like?

And in this case, there's a range of possible alternatives that could have existed. So, for example, if -- the one I just mentioned, if the alleged breach is that there weren't passive funds included in the menu, then if they had included passive funds, the -- what would that have looked like? Would that have been a complete replacement of all active funds with passive funds? From what I've heard in the courtroom, that doesn't seem like that would have been the solution, nor would that have to have happened in order for the breach to have been cured. More likely, there may have been some passive alternatives added to the menu.

Q. And did Dr. Pomerantz do any kind of a -- a modeling that allowed for the adding of passive funds to the menu rather than the wholesale replacement of the menu with passive funds?
A. No. He -- he didn't. And he testified that his model doesn't accommodate anything except a complete elimination and replacement with an alternative. So as a damages expert, I considered that to be just -- it's a flaw in the model because that's clearly an option that could have been pursued that would have addressed the alleged breach, but his model doesn't accommodate it. But I --
Q. So Dr. -- Dr. Pomerantz, as you were saying, he does these one-to-one mappings in each of his models. So each one maps the -- the Plan fund into only one other fund. But earlier, you mentioned that there's another way of doing it potentially, and that's to use a range of comparators?
A. That's right. I think that's the proper way to think about the but-for world is that if there's a range of alternatives that the Retirement Committee might have selected, if they had been acting as the plaintiff claimed they should have been, then it's going -- it's really arbitrary to take just one of those alternatives and say I'm going to calculate damages by comparing to that one alternative.

If there's a range of alternatives, your damage model should account for the fact that there are a range of

alternative -- alternatives, or we would say in the but-for world, there could have been not just one fund that met the criteria, but there's a whole range of funds that meet the criteria. And so our damage calculation should recognize that fact and accommodate this idea that it's not a one-to-one mapping, but it's a one to many mapping. There's a range of possibilities and -- and -- because that just corresponds to the real world and what would have potentially happened in the but-for world.

Q. So Dr. Pomerantz testified here in court that he had four different models, each of which could have been selected assuming a prudent process. Do you recall that?

A. Yes.

Q. And he further testified that any plan that is a result of a prudent process would be prudent; is that right?

A. Yes.

Q. Okay. By the way, did he say that that was true if and only if he determined what was prudent?

A. He did, I think, have that caveat on it, that he was the arbiter of such things.

Q. And he testified that there is latitude -- that was his word I think -- in the outcome of a prudent process, and many possible menus could have been the outcome of a prudent process. Do you remember that?

A. Yes.

Q. Okay.
A. I do.
Q. So does that testimony from Dr. Pomerantz change your view that Dr. Pomerantz's use of single comparators in his models is unreasonable?
A. No. It doesn't change my view. It just confirms this idea that -- that there are many alternatives that -- that would have cured the breach or would have been a proper choice.
Q. And do you recall whether Dr. Pomerantz testified that his alternative funds were prudent?
A. No. I think he explicitly -- I'll say in general, he said that he didn't make a determination as to whether the alternative lineup -- the funds in those lineups were prudent. So he didn't -- he's not offering an opinion about the prudence of the lineups, I guess with a couple exceptions. I know he did explicitly say that he didn't think Model 3 was a model that a prudent process -- that would have resulted from a prudent process. So I guess he's in some way opining about -- about that one.
MR. ENGSTROM: Objection, Your Honor. Mischaracterizes Dr. Pomerantz's testimony.
THE COURT: You don't -- he -- the statement of he didn't think Model 3 was a model that a prudent process would lead to, right? That's what your objection is?

MR. ENGSTROM: Correct.

THE COURT: He didn't say that?

MR. ENGSTROM: I believe his testimony was, in fact, that there were hundreds of fiduciaries that did engage in processes and had selected those funds. And while he took issue with perhaps two or three specialty funds in the model, I think he overall testified that Model 3 represented, in the individual choices, a very likely outcome of the prudent process.

THE COURT: Yeah. I'm going to let you cross-examine on that. Mr. Nemser, do you have any -- later. Do you have anything?

MR. NEMSER: I do have something to say, Your Honor --

THE COURT: Yes, sir.

MR. NEMSER: -- which is that I read him his deposition in this case in which he specifically said no prudent sponsor -- in his opinion, no prudent sponsor would have chosen that specific Model 3 menu.

THE COURT: Was that the point where I looked at Dr. Pomerantz and asked if he'd like to give up a particular model?

MR. NEMSER: Yes.

THE COURT: Was that when I did that?

MR. NEMSER: That was when that happened, Your

Honor.

THE COURT: Okay.

MR. ENGSTROM: But, Your Honor, I believe -- we could look at the full transcript, that related just specifically to the inclusion of a -- of a fund in a gold asset class within Model 3 as well as the market neutral asset class.

THE COURT: All right.

MR. ENGSTROM: But to characterize that as his opinion with regards to Model 3 I think grossly misstates his testimony.

THE COURT: I understand your objection.

MR. NEMSER: Well, the record will tell.

THE COURT: Yeah. And we'll let you cross-examine. Please proceed.

MR. ENGSTROM: Thank you, Your Honor.

Q. So as an expert on economic loss and damages, is it your view that mapping from the existing funds into imprudent funds would be an appropriate way to go about measuring damages?

A. No. I think if there's a possibility that your model is using imprudent funds as the but-for alternative or alternative lineup, then I don't think you have a damages model because that -- this -- that can't exist. That's not what you're trying to measure. You're trying to measure what a prudent alternative would have resulted in. So I think

that's a -- kind of a terminating flaw.

Q. Okay. So you've talked about how -- I think how Dr. Pomerantz himself offered multiple comparators in a few contexts. Even though when he does the mappings in the models, he's going one-to-one every time, he did put forward some situations where he -- he seemed to accept the idea of multiple comparators. Can you give the examples that you thought of?

A. Yeah. I think there -- there are three that I think I would point to. One is, if you look at each at-issue fund and then look across the four models that he proposes, he has up for four alternative replacement funds in each -- in those models. So he himself has identified four alternatives for -- up to four alternatives to each at-issue fund, which he claims could have resulted from a loyal and prudent process. So that -- that's one set, just the ones that he identifies, which are up to four.

Then, secondly, in Model 3, if you'll recall, this is the model where he uses this kind of popularity criteria to say, you know, if a lot of funds have these -- or, excuse me, if a lot of plans have these funds, then I'm going to use -- he's going to use that as a criteria to say, well, that's likely -- that's likely a prudent alternative. So he starts that process by looking at the five most frequently subscribed funds in 401(k) plans, but then he imposes a second criteria

and says, well, of those five, I'm going to pick the one with the most assets. And that's the comparator that he uses in Model 3.

But there are, in some cases, hundreds of funds within any particular comparator group. He's got the five that are most widely used, and he picks one of those. But the five that are most highly used out of a hundred or two hundred funds, that meets a certain level of popularity criteria to my mind as well. So I take a look at a second group, which is just taking those five most popular funds that he identifies within each -- I think it's the Morningstar category, and I do an analysis of those. So that's another range -- if you want to think about a range of possible prudent outcomes, that's another set of possible prudent choices that a fiduciary could have made.

Q. And is there a third example of a situation where Dr. Pomerantz is working with multiple comparators?

A. Yes. The third one is -- and I'm kind of moving most directly to Pomerantz to get a broader category. But the third one is for 18 of the at-issue funds, Dr. Pomerantz identifies what he calls marketplace alternatives. And there's between eight and 10, I think maybe up to 12 marketplace alternatives that he identifies for -- this is just for 18 of the at-issue funds. It's not the entire menu. And he does some analysis of those. He -- I think he listed

the beta, the alpha, the information ratio, and he kind of looked at some of the -- some of the statistics for all of those funds. But that -- if you want to think about a range -- you know, another possible range of prudent alternatives, that set of eight to 12 is another group that he considered to be competitor funds.

Q. And, yeah, he said those were competitive funds with the at-issue funds, right?

A. That's correct.

Q. Okay.

A. I think he also said that the -- most of those were superior to the American Century option. So these are -- I mean, these are well-performing funds, according to him.

Q. And this -- this is from Exhibit 5 of Dr. Pomerantz's expert report?

A. That's correct.

Q. And I -- and at cross-examination, I took him through one example, which was the Heritage Fund, the American Century Heritage Fund, and showed that it -- how it compared to all those other comparators that he had --

A. That's correct.

Q. -- in the listing?

A. That's correct.

Q. Okay. So did you analyze the performance of the at-issue funds, the funds that were actually on the menu, using these

three different types of sub -- sets of multiple comparators that you just talked about?
A. Yes.
Q. Okay. So let's go through -- well, let me just ask you in broadest terms, what did you find?
A. Well, I found that if you move from a single alternative to a range of alternatives -- and, actually, any one of these three ranges of alternatives, you find no evidence of economic harm to the Plan or Plan participants.
Q. Okay. So I do want to go through each of the three groups. So did you make a demonstrative of your analysis about the range of competitors in the four damages models, Models 1, 2, 3 and 4?
A. Yes. The narrowest set, correct.
Q. Okay. Could you pull up DX 798, please, Chris?
Great. So this is -- this is in your expert report, right?
A. Yes, it is. It's known as the Christmas tree chart.
Q. Because of all the red and green?
A. Yes.
Q. And there's a lot of different red and green in here, right?
A. There is. There's -- there's -- there's a lot of both colors here.
Q. And what -- what does red mean, and what does green mean?

And what does it mean that there's a lot of both?

A. So this -- just to orient you to this exhibit, the -- I have the at-issue funds on the left-hand side, and then there are four columns there, Models 1, 2, 3 and 4. Those are Dr. Pomerantz' models. And I show for each of those models, for each of the at-issue funds what his estimate of the damages is. Red means there are damages. I see positive damages. Green means there are negative damages, which means the American Century fund actually outperformed the alternative.

Q. And we're looking here at a setup for the April 1st time period that Dr. Pomerantz included in his report. He didn't put in any but the Model 4 damages calculation for this time period at trial, right?

A. That's correct. This is for the shorter time period. And this is the -- he applies the Hewitt model in the shorter time period because the Hewitt report came in after the June 2010. So he actually calculates damages for Hewitt on a slightly shorter time period than the other ones.

Q. But you also did one for the longer time period for Models 1 through 3, right? And we'll talk about that in a second.

A. That's correct.

Q. Okay. So -- and we'll also come back in a second to the columns on the far right here. So for the moment, what I propose to do is go to a demonstrative that you created that

isolates on the -- on the -- I think it's the second row there, American Century Disciplined Growth Fund?

A. Yes.

Q. And just use that as an example to talk about how you're thinking about what's on --

A. Yes.

Q. -- the -- DX 798. And so if we could call up, Chris, DX 872, please.

So what is shown here?

A. So this is just kind of the detail behind that second line on the graph we were just looking at. And this is for the American Century Disciplined Growth Fund. It shows for each of Dr. Pomerantz' four models the four alternatives that he selects. So the Vanguard Growth Index Fund in Model 1; the Vanguard Institutional Index Fund in Model 2; in Model 3, Fidelity Contra; in Model 4, the American Century Growth Fund.

So for the American Century Disciplined Growth Fund, he's identified four options that I'm using here as the range. And what I'm essentially asking is, did the American Century fund perform within the range of the alternatives that Dr. Pomerantz contends could have resulted from a loyal and prudent process. In this case, the fund did in -- for two of the options, options Model 1 and Model 3, the American Century fund underperformed the benchmarks. But in two of the models, Model 2 and Model 4, the American Century fund outperformed

the index. So if I'm asking the question did the American Century fund perform within the range, what I'm really asking is did it perform better than a minimum performing fund out of the four reasonable alternatives. And in this case, the answer is yes, it performed better -- well, actually in this case, better than two. I guess I put that mark on there.

Q. So -- so on Model 4, that one, the American Century Disciplined Growth outperformed Dr. Pomerantz's comparator, the American Century Growth Fund, by $114,000, right?

A. That's -- that's correct.

Q. And so that puts it in the range among these four, in the sense that it was -- it was better than at least one, and, in fact, it was really better than two, right?

A. Yes. Exactly. In this case, it fell within the range, that is to say -- an alternate way of saying that is it performed better than the minimum performing of the three alternatives.

Q. Okay.

A. Just -- just as an aside, I'll volunteer here that I'm ignoring statistical significance because in this example, there's no statistically significant difference between the Disciplined Growth Fund and any of these four funds. So I'm sort of adopting Dr. Pomerantz' practice of not considering that, but I think properly, we should just sort of eliminate this Disciplined Growth Fund from consideration for damages

because it's not statistically significantly different than any of the benchmarks that Dr. Pomerantz identified. But that's an aside.

Q. And by the way, and sort of in the same vein, when you're using the comparators that Dr. Pomerantz came up with were Models 1, 2, 3 and 4, are you endorsing those as good comparators?

A. That -- that's a good point. I think there's two points to be made here. I'm just accepting these at face value. As we'll talk about later, I think there are many instances where the comparator fund is not an appropriate fund to compare to. But for the time being, I'm ignoring that. And then I'll just say secondly that this model is -- is really overly restrictive because I'm only looking at the four alternatives that Dr. Pomerantz explicitly endorses. And he himself acknowledges that there's lots of other funds out there that could be prudent funds. So this model, by its nature, is overly restrictive. But we're just going to take it as it is and just look at these four -- four options.

Q. Okay. Let's see where we are here. So let's go back to the DX 798 now where we're looking at -- this is pages 1 of 3. So it goes on for three pages. You pick up all the at-issue funds, right?

A. That's correct.

Q. Okay. So what is going on in these right-hand columns of

this DX 798?

A. So in the right-hand column, I'm -- I'm testing just what I -- what we were talking about. I'm asking the question, did the at-issue fund perform within the range of these four options? And in particular, did it perform better than the minimum of the four options that I'm seeing here? And if it -- and so I -- I -- in the second to the right-hand column where I say minimum damage amounts, I answered that question. And if the answer is it's performing worse than the minimum alternative, then I pick up the damage number for the -- the minimum performing model. And if it's performing better, then I pick up the -- the difference in green on the right-hand column.

So maybe an example would be helpful. We were just looking at the American Century Disciplined Growth Fund, which is the second row in this column. And we saw that the minimum performing model for Dr. Pomerantz is the one that generates either the largest green number or the smallest red number, is the way I think about it. So the largest green number is Model 3 -- Model 4. That's the minimum performing of the alternatives, and that's the difference between how the actual fund performed and that minimum performing alternative that Dr. Pomerantz identifies.

So I take that value. And in that case, it's $114,000 positive. And I report that in this column labeled

minimum damage amount. So that says if we use this minimum of the range as the -- as the point at which we say the -- if the process had been loyal and prudent, the fund could have performed like that fourth fund. And we're reporting it here in the minimum damage amount column. So that's what I'm doing across this line.

If you look at the first row, that's an instance where all of the alternatives in Dr. Pomerantz' outperformed the American Century option. So in that case, I pick up the -- the minimum performing alternatives in Model 3. That's $21,000 of damages. That's a positive damage number. So that's an example of how -- how this table works. And I -- I do this for every at-issue fund and determine what the implied damages are.

Q. And so I want to come back to this issue about the minimum. But before we -- we go there, I just want to talk about totals. And if we could go to page 3. What do you find?

A. Well, when I -- in the second to the right-hand column, if I sum up all of those -- those calculations of damages, positive and negative, I arrive at the conclusion that there are no damages when you compare the at-issue fund against this range of four alternatives. And that's because the bottom right-hand number, 18,000 there, is negative. So that means there's negative 18,000 -- or, excuse me, $18 million in

damages, using this range of comparators as opposed to just a single individual comparator. And you can see -- if I just stay along that line, you can see the damages that Dr. Pomerantz calculated in each of his four models by looking just at a single comparator. And those, as we know, are between 8 million and 29 or so million dollars when you're looking just at a single alternative rather than all of the alternatives that he's identified.

Q. So why is it -- well, let's go back to page 1, just so we can focus back on disciplined growth as just an example. Why does it make any sense to use this minimum? Why do you get to pick the lower one?

A. Well, because the -- the question is, if the -- if it had -- if the process had been loyal and prudent, and there was a range of alternatives that may have been selected, and if the at-issue fund performed within that range, then it performed within the range that we could have experienced in the but-for world without the breach. And consequently, as long as it's in that range, we can't -- we can't assume there are any damages because that's an outcome that we could have experienced with a loyal and prudent process.

Q. So -- so here, on this Disciplined Growth, when you're looking at the Model 4 one, the at-issue fund there, Disciplined Growth, performed $114,000 better than another fund, which Dr. Pomerantz says came out of the prudent and

loyal process?
A. That's correct. That's right.
Q. And so -- and similarly, when you look at the previous line, you would say that, well, the -- the Capital Preservation Fund, I think it is, performed $21,000 worse than the -- the one which could -- would have resulted from a prudent process as well?
A. That's right. If we -- if we take the sort of restrictive view and just for the moment, say, okay, well, let's assume that a prudent process -- there's only alternatives that would have produced, that could have come from a loyal and prudent process, and the four that Dr. Pomerantz identified, then the Plan members would have been better off with one of those four alternatives than -- actually, all of those four alternatives than with the at-issue fund. And, therefore, there are damages in this -- in this model if -- if you make that assumption.
And you can see in the right-hand column, the second to the right-hand column there, you know, there are a number of those that fall below the -- the minimum. I'll just volunteer, there are also a number that fall above the maximum where the American Century outperformed all of the funds that Dr. Pomerantz identified. So they're on both sides.
Q. And just to -- to -- I don't want to have to call this back again in a few minutes, and so I will just ask, if you

look across a row here, for -- for many of these rows, you see green and red --

A. Yes.

Q. -- in the same row?

A. Yes.

Q. That's what happened in Disciplined Growth, but that wasn't unusual, right?

A. That's right. There were many of these lines where you see if you look at the different models, some of the models show damage associated with an at-issue fund, and other of Dr. Pomerantz', for the same fund, show no damages or positive damages. So this is the inconsistency that I --

Q. And we'll come back to that in a second. I just wanted to be sure that the Court had a chance to see what this thing really looks like. And we can obviously call it back if we need to, but I'd prefer to -- for timesaving to skip it.

MR. NEMSER: So at this point, I would move DX 798 into evidence.

THE COURT: Any --

MR. ENGSTROM: No objection.

THE COURT: 798 is admitted.

MR. ENGSTROM: Oh, I'm sorry, Your Honor. I do have an objection.

THE COURT: Sure.

MR. ENGSTROM: In that this analysis is only from

April 2011 to June 30, 2017. And Models 1 through 3 of Dr. Pomerantz's analysis, at least what's in evidence and been offered as testimony, only start from July 1st, 2010. So I would actually object on the grounds that it's misleading in light of which models have actually been introduced into evidence.

MR. NEMSER: Well, I was just about to offer --

THE COURT: Hold on.

MR. NEMSER: I'm sorry, Your Honor.

THE COURT: That's all right. You agree that he did it -- had a different time frame for Model 4, right?

MR. ENGSTROM: Sure. And in his report, he did a version of Models 1 through 3 starting from April 2011, but they have not been offered into evidence in this case.

THE COURT: Okay.

MR. ENGSTROM: And so, I mean, with the caveat that these are looking at models that are not actually even in evidence in this case, at least as to Models 1 through 3, I'm fine with it being admitted.

THE COURT: This is in his expert report, though, right? You agree with that? That you reviewed.

MR. ENGSTROM: Dr. Pomerantz's original expert report contains two calculations for every model, one with a start date of July 1, 2010, and one April 1, 2011. But that's not what's been offered into evidence is all I'm saying.

THE COURT: And -- but your -- my question is, you reviewed this report before you came here today?

MR. ENGSTROM: Sure.

THE COURT: Because this is what this witness came up with. And is this -- I mean, is this leading me to a place that's not accurate? Is that the problem? Or it's just the time frame we're talking about?

MR. ENGSTROM: It's leading you to a place that's not accurate because it gives -- it gives a measurement as to the minimum damages, or at least using the worst performing funds as to four models. And three of those four models are not models that they introduced into evidence in this case.

THE COURT: So he -- this witness has just testified that if we add the right-hand columns, that the number we get is on I think page 3 of this, $18,161,259 to the good under his version of this. You're saying that that -- would it be completely different number in favor of the plaintiffs?

MR. ENGSTROM: Well, I'm sure -- I believe Mr. Nemser is probably going to get to it, but this exhibit itself, three -- I don't have any qualms with his math. The issue is that models -- the columns in Models 1, 2 and 3, those are not models that have been introduced into evidence in this case because they use different start dates than any model that Dr. Pomerantz testified about or any exhibit that's been given. So it's just --

MR. NEMSER: May I -- may I -- I'm sorry.

THE COURT: Go ahead, Mr. Nemser.

MR. NEMSER: May I -- yeah. Please.

THE COURT: Yes, sir.

MR. NEMSER: Your Honor, I started with this one because it's got all four. And as Mr. Engstrom is correctly saying, the other one, the shorter one -- or, I'm sorry, the longer time period has only Models 1 through 3. So it seemed like the less informative example. My next thing to do is to offer the one that covers the longer time period in which the result is exactly the same. So I -- that's where I am.

MR. ENGSTROM: Your Honor, with the understanding that this uses -- that Exhibit 798 uses a version of Models 1 through 3 that are not in evidence, I'll withdraw my objection.

THE COURT: 798 is admitted. Thank you.

(Defendants' Exhibit 798 admitted in evidence.)

MR. NEMSER: Thank you.

Q. So you -- did you repeat the analysis that you did in 798 for the longer time period, which began in June 30th, 2010?

A. Yes.

Q. Okay. And if -- Chris, if we could call up DX 797, please.

And so briefly, you know, what are we seeing here?

A. This is the exact same type of analysis. It's for the

longer time period. Dr. Pomerantz's model for Model 4 doesn't extend back to the beginning of this period. So in this case, there's really -- there's only three models that I'm comparing against because he only calculates damages back to June of 2010 for these three.

So this is an even more kind of restrictive set. Instead of four potential funds that Dr. Pomerantz identifies, we're only looking at three potential alternative funds that he -- that he calculates. But the logic and the -- and the conclusion is the same for this longer time period.

Q. So even for the Models 1, 2 and 3 results, which plaintiffs have chosen to offer in evidence, to the exclusion of the shorter period results for those models, what did you find in total?

A. If we can go to page 3 of this --

Q. Sure.

A. -- exhibit. For this model, the result is no indication of harm or economic loss to the -- to the Plan members. Essentially, they're to the good about a little over $11 million.

MR. NEMSER: Okay. I move to admit DX 797.

THE COURT: All right. 797 is admitted. Thank you.

(Defendants' Exhibit 797 admitted in evidence.)

Q. Okay. So that was your -- the first multiple comparator set that you talked about. And then the next one involved the

top five funds, the most popular, most widely used funds in -- in plans with more than $250 million in assets, right?
A. Correct.
Q. Okay. So I think we've already had explanation of what these top five are. So I'm -- we'll just propose to move right to the demonstrative that shows what you -- your analysis was for the top five. But let me just ask before that, was your analysis for the top five essentially similar to your analysis for the Pomerantz comparators in the model?
A. Yes. I'm -- again, I'm -- I'm asking the question if we compare against a range of logical alternatives, do we get a different answer than if we just pick one of the funds arbitrarily and say we're going to compare against that one. So I use the same methodology, but instead of looking at the four alternatives that Dr. Pomerantz identifies in his four models, I'm now looking at the set of five most popular funds. The logic, the math is all the same.
Q. Okay. And so, Chris, if we could call up DX 804, please.
And is 804 another exhibit from your report?
A. Yes, it is.
Q. Okay. And so are we looking here -- so column 1 shows the relationship between the at-issue fund and one of the five funds?
A. That's correct.
Q. And then you have a similar thing across the row for each

of the five funds in the top five, right?
A. That's correct.
Q. And then you show on -- on the theory that a prudent and loyal process could have yielded any of those top five funds on that assumption, you reasoned that you would pick the minimum damage amount?
A. Yes. For the same reason. Because the question is, did the actual fund performance fall within the range that we would expect from a loyal and prudent process. And the way we test that is to say was -- was it more, did it perform better than the minimum performing of the five that we're identifying here.
Q. And so if you take the second line on this one for Disciplined Growth, if we look across, we see there's -- there's one red, I guess, and the rest are green. And the one on the -- Fund 5, the Disciplined Growth Fund outperformed the -- this popular fund by about $228,000?
A. That's correct.
Q. And so that's the -- the -- the range of potentially prudent outcomes?
A. That's right. That option -- that -- in this case, Fund No. 5 established the minimum of the range. And so that's the one we're comparing against.
Q. And so you then inserted that $228,000 in your farthest right column?

A. I did.
Q. Okay.
THE COURT: Can I ask you a question?
MR. NEMSER: Sure.
THE COURT: So these top five funds -- never mind. I understand. I've just -- thank you. I withdraw my question. It hasn't been asked yet, but go ahead. Sorry.
MR. NEMSER: Okay.
Q. So what did you get for a total?
A. If we can go to the bottom here. So comparing against these most popular funds, I find that the -- the at-issue funds the American Century options outperformed the minimum of the range by about $39 million. So the Plan members were $39 million to the good relative to the -- the range that these funds represent.
Q. So when you compare to the Pomerantz comparators, it ends up with negative damages? And when you compare to the top five, Dr. Pomerantz's top five, you also end up with negative damages?
A. Yes.
Q. Okay. So let's -- let's look at the last category that you talked about, and that had to do with those marketplace alternatives?
A. Yes. These are the 8 to 12 marketplace alternatives that Dr. Pomerantz identifies for 18 of the at-issue funds.

MR. NEMSER: All right. I guess I should -- if I haven't already, I should move this one on -- with the top five into evidence. Chris, could you flip to the first page? It's DX 804.

THE COURT: Any objection to DX 804?

MR. ENGSTROM: No objection.

THE COURT: DX 804 is admitted. And we're moving now to number 5 of his first DX 867 basically, right? So I can track? Okay.

(Defendants' Exhibit 867 admitted in evidence.)

A. And I should say we also did this analysis of the five for the -- for the longer time period as well.

Q. Right. I think this is DX 803. Let's pull that one. See if that's the -- yeah.

So this is -- is this the one for the other time period?

A. Yes. This starts in June 30, 2010.

Q. Okay. And what did you get on this one?

A. If we go to the bottom of the slide, we can see it's -- again, it's negative damages, in this case, $46 million to the good --

Q. Okay.

A. -- with the American Century options.

Q. All right. So --

THE COURT: Could you go back? I'm sorry. Could

you go back to that last page again, sir? I was writing that down.

MR. NEMSER: Absolutely.

THE COURT: Thank you. One moment, please.

MR. NEMSER: Sorry, Judge.

THE COURT: You're fine. Please proceed. We have about 50 until the next recess.

MR. NEMSER: Okay.

THE COURT: I'll just give you a heads up there.

Q. And just to be clear, what -- we're still in the realm of the single but-for alternative, right?

A. Yes. We're talking about if you expand a single but-for alternative to a range, do you get the same answer as Dr. Pomerantz got in terms of damages.

Q. But if you -- you get -- you don't get the same answer as Dr. Pomerantz?

A. Yeah. The question is do you. And the answer is, no, you don't. You conclude that there is no -- there is no economic loss suffered by the Plan members as a result of having the American Century Plan -- actual Plan menu.

Q. And you did take a look at the -- a third kind of range, right? That's these marketplace alternatives?

A. Yes.

Q. All right. And these are the ones that I asked Dr. Pomerantz about on cross-examination from his Exhibit 5 in

his report?

A. Yes.

Q. And just to kind of put it up there, if we could go to page 77A of the Pomerantz report, Chris.

So this is something that we looked at during the cross-examination. And it's a piece of Dr. Pomerantz's Exhibit 5. It's actually one page running on to another, which is why it's divided that way. But this is a -- a chunk of that exhibit, right?

A. Correct. It's the lines that correspond to the marketplace alternatives for the American Century Heritage Fund.

Q. And so when you were looking for marketplace alternatives to the American Century Heritage Fund, you looked in this one to the list below, where it talks about Heritage, right?

A. That's correct. I think there were 11 alternative -- marketplace alternatives that Dr. Pomerantz identified in this instance.

Q. Okay. And then you're going to compare Heritage to each of those 11 in a way -- is that in a way similar to the way that you did it the previous two times?

A. Yes. Exactly the same way. I'm just now comparing to this group of -- of alternatives.

Q. Okay. So in your report, is there a demonstrative to show that analysis?

A. Yes, there is.

Q. Okay. Let's pull up DX 805, please.

Tell us about DX 805. It doesn't look like the same. It's not a Christmas tree chart.

A. That's right. There's just -- there's too many columns to display it the same way I displayed the other ones. So in this case, there's between 8 and 12 columns. So the calculation is the same, but here I just report the minimum alternatives. So for each of the 18 at-issue funds, I identify what the return was for the at-issue option. And then I identified the range for the 8 to 12 marketplace alternatives that Dr. Pomerantz identified. And in those columns with the check mark, I asked the question, did the at-issue fund perform within the range that was observed for these marketplace alternatives. And I find that in all 18 cases, the answer is yes.

Q. In all 18 cases?

A. In all 18 cases, the at-issue fund performed within the range of the marketplace alternatives.

Q. And when you looked at the minimum returns in aggregate, is that down at the bottom of the page?

A. That's right. So that's the same calculation that I did for the other groups of -- the other two ranges. And I find damages of negative $38 million or $39 million. So the American Century Plan participants were $39 million to the

good relative to the minimum of these alternatives.
Q. And so this -- this was -- this exhibit -- or not quite yet an exhibit -- DX 805 is from your report?
A. Correct.
Q. And did you convert the information that's contained in DX 805 into a -- a visual representation of it?
A. Yes, I did. I took this data, and I displayed it in a graphic form rather than a tabular form.
Q. Did you do anything different by way of analysis?
A. No. The values were taken right off this page.
Q. And did you essentially use a piece of software that just converts the tabular display to a -- a graph?
A. Yes.
MR. NEMSER: Well, let me actually move the Exhibit 805 into evidence, please.
THE COURT: Any objection?
MR. ENGSTROM: None.
THE COURT: 805 is admitted.
(Defendants' Exhibit 805 admitted in evidence.)
Q. So now, if we can call up DX 891, please.
What is this?
A. This is just a -- a graphical display of the data that was on the exhibit we were just looking at. So I've listed on the left-hand side the 18 at-issue funds that Dr. Pomerantz identified. Then for each of those, you can see the two gray

dots and the line connecting them, that's the range of performance of those marketplace alternatives. And then the blue, I guess it's a rectangle or diamond, identifies where the American Century fund performed within that range or, in some cases, it was beyond the range.

So you can see, for example, the Ultra Fund, the range of cumulative annualized returns was somewhere around 13 to 19 percent for those alternatives. And the American Century Ultra Fund fell a little bit above the midpoint for that range.

THE COURT: So the ranges -- if we go down to the bottom, Disciplined Growth --

THE WITNESS: Yes.

THE COURT: -- your blue diamond represents where the American Century fund was in comparison to the range of the alternatives, plural, or one alternative?

THE WITNESS: To the alternatives. So in that case, there were, I think, 10 or 11 marketplace alternatives. And so all of those 10 alternatives fall between that left-hand gray dot and the right-hand gray dot. So that's the range that's established by -- by those marketplace alternatives. And as you can see, they -- they kind of move around similarly and because they're -- they're in the same Morningstar category. They have kind of similar returns. But this is -- just allows you to eyeball where the -- the American Century

fund fell within the range of all of those marketplace alternatives.
Q. And if you look at real estate, which is about five down from the top --
A. Yes.
Q. -- that one looks a little different because the blue is over to the right of --
A. Yeah.
Q. -- the -- of the interval?
A. Yes. That's right. So the -- all of the -- I'll say it the other way around. The American Century option outperformed all of the marketplace alternatives that Dr. Pomerantz identified for the American Century real estate fund. And that's why the -- the blue diamond is outside the -- the bar for the competitive -- the alternative plans.
Q. All right. So -- so the -- the upshot with respect to the marketplace alternatives was that the performance of the American Century fund was within the range for all 18 of the marketplace alternatives, right?
A. That's correct.
Q. And that if the damages had been totaled up just for those 18, which were the only ones we had information about in terms of marketplace alternatives, the total damages for those would have been negative?
A. That's correct.

MR. NEMSER: I move admission of DX 891.

THE COURT: I think we admitted that already.

MR. NEMSER: Oh, I think we admitted the underlying tabular one. This is the graph.

THE COURT: Okay. I'm sorry. 891. Any objection?

MR. ENGSTROM: No objection.

THE COURT: Thank you. It's admitted.

(Defendants' Exhibit 891 admitted in evidence.)

MR. NEMSER: So I'm -- if we're getting close, Your Honor, it might be a place to stop, or I could just --

THE COURT: Well, we weren't going to take a recess until 3:00. I think -- I meant to say 50, and I may have said 15. I'm sorry, Mr. Nemser.

MR. NEMSER: Oh, okay.

THE COURT: So we've got until three o'clock. That gives us another 40 minutes. Thank you, sir.

MR. NEMSER: Oh, great. Happy to go on.

Q. So after -- after doing these three comparisons across the range of comparators, the three different ranges that you did, what's your conclusion?

A. My conclusion is that if we relaxed this what I think is an inappropriate assumption that there's just a one-to-one comparison, and we actually consider the -- the real world alternative, that there's a range of prudent and loyal alternatives, then we have to conclude that there's no

evidence that the Plan or its participants was harmed by the American Century options that were actually on the menu.

Q. Okay. And just for completeness, could you pull up DX 806, please, Chris?

And so is this a calculation similar to the one we were looking at for the other time period?

A. That's right. This is for the shorter time period.

Q. And does this too show that the total damages for these were negative and that all of them were -- all of the American Century funds were within the range?

A. Yes. That's right. And it shows negative damages of 34.4 million. So 34.4 million to the good relative to the minimum of the range.

MR. NEMSER: Okay. So I move to admit DX 806, please.

THE COURT: Any objection?

MR. ENGSTROM: Your Honor, same objection as before, that again this uses a start point that is inconsistent with Dr. Pomerantz's models.

THE COURT: Same ruling as before. This will be admitted. Thank you.

(Defendants' Exhibit 806 admitted in evidence.)

Q. So the next of your flaws that you talked about, Doctor, was inconsistent damages across models. And, Chris, if you could bring up DX 873, please.

So inconsistent results across models. What's that about?

A. Well, this is -- my conclusion here is based on looking at Dr. Pomerantz's estimate of damages for a particular at-issue fund across his four models. And as we saw in the Christmas tree chart, there are many instances where a couple of the models indicate damages, a couple of the models indicate no damages or, you know, any combination of all four indicate damages or not. But there's -- there's -- if you look across those -- those rows, you'll see combinations of red and green, which indicate that he's getting an inconsistent measure of whether there are damages or not, depending on which particular alternative he looks at.

And then, in addition to that, even when, for example, there happen to be all the -- say they're all the same color, so there's all damages in a particular row, many times they're -- they're significantly different estimates of damages. So it may be a small value and a very large value, even though they're both measures of damages. But that's an artifact of just comparing to a single alternative. And it -- it represents an inconsistency, or it shows an inconsistency across the models, which is, to a damaging expert, that's a troubling conclusion.

Q. So -- so do you have an example -- well, a troubling conclusion why?

A. Well, because it indicates that what you're measuring in your damage model is probably not the conduct that you're trying to -- to measure. Because if you're measuring the same thing across all of those models, you should get a similar result, or at least you should ask the question, well, why am I getting a different result here? Does this make sense? And there's not a good explanation for many of those instances. And so it's just a -- a symptom of the various other problems that -- that I think Dr. Pomerantz's models have.

Q. And so do you have an example you can give?

A. I do.

Q. What -- what's an example?

A. Well, let's see. I mean, gold is -- is a great example where we have a couple of models where there are negative damages associated with gold and a couple of models where there are damages from 9 to $14 million or so. That's a big inconsistency across models. In terms of the magnitude, I think that might be the biggest example. But it's not the only example. There are many examples.

Q. So let's pull up DX 874, please.

Does this illustrate the point that you were just making --

A. Yes.

Q. -- about gold?

A. Yes, it does.

Q. How -- how does it illustrate it?
A. So Dr. Pomerantz for the -- the American Century Gold Fund chooses -- across his models, he actually chooses four different benchmarks to calculate damages. In three of those, Models 2, 3 and 4, he finds damages, but in Models 3 and 4, those damages are, you know, on the order of 9 to $14 plus million. In Models 1 and 2, he finds in one case, Model 1, there's negative damages, in Model 2, there's small positive damages. And it's -- it's just an inconsistency of -- of what he's estimating as damages for the gold fund across the four models.
Q. And is the information in DX 874, is that -- that table in your report?
A. Yes, it is.
Q. And did you -- well, so what -- what do these large swings tell you?
A. Well, in this case, what they tell me is there's an inconsistency across models. It's pretty clear what's going on here. In Model 1 and 3, Dr. Pomerantz has chosen a comparator that actually has something to do with gold. And so when you compare the gold fund against something that has to do with gold, you see that it performed, you know, about like those other gold indexes.
In Models 2 and 4, he compares in Model 2 to the Vanguard Total International Stock Fund, and in Model 4 to the

American Century Global Growth Fund. So these -- these as we've -- I think we've talked about don't -- don't have anything to do with gold. These are just general equity indices. So what he's measuring in those two is just the difference in performance between these broad equity indices and gold.

Q. And did you make a graph demonstrative that -- that illustrates the point over the class period of -- of how different the Model 1 and Model 3 comparator were from the Model 2 and Model 4 comparators?

A. Yes. For the comparators that Dr. Pomerantz identified, the ones that are listed here in the top row of this table.

Q. And so, Chris, if you could bring up DX 877, please.

So what does this show, Doctor?

A. This shows -- from the longer period starting in June of 2010, it shows the relative performance of -- there's actually -- it's hard to see, but there are five -- five options here. The American Century Gold Fund is in blue, and that tracks, as you can see, these other two gold-related index -- indices, the New York Stock Exchange Gold Miners Index and the Fidelity Select Gold Fund. So you can see if you're comparing the American Century Gold Fund against gold-related indices or another gold mutual fund, it's tracking very closely over time to the -- to the actual performance of the -- of the gold index. And that's why we

saw on the prior slide the damages amounts are small. One is positive, one is negative. But these are essentially performing similarly.

In contrast, if you -- the upper two lines reflect -- I think the top one is the American Century Global Growth Fund, and the second to the top, the one that ends at $1.62 is the Vanguard International Stock Index Fund. Those don't have anything to do with gold. They track a broad index of equities. And equities did pretty well over this period. So those are going up and to the right. And the vertical distance between the American Century Gold Fund here and each of these alternatives is -- is equivalent to the damages that Dr. Pomerantz estimates. So this just demonstrates the importance of -- of what fund you're comparing against if you're looking only at one option. And that's what's driving the difference here for gold.

Q. And so you have -- you have three lines down toward the bottom that tightly track each other?

A. That's right. In fact, sometimes you can't really tell them apart.

Q. And then you have two others that seem to be off on their own detour?

A. That's correct.

MR. NEMSER: Okay. I move to admit eight -- DX 877.

MR. ENGSTROM: No objection.

THE COURT: Thank you. 877 is admitted.

(Defendants' Exhibit 877 admitted in evidence.)

Q. And did you come up with just one other illustrative example with respect to this inconsistency point?

A. I think I did.

Q. Related to U.S. Value Yield Equity Trust?

A. Oh, yes, that's right.

Q. Okay.

MR. ENGSTROM: Objection, leading.

THE COURT: Overruled.

Q. DX 875, please.

So what does this one show?

A. So this is a similar comparison. This is taken from the Christmas tree chart that just shows for the U.S. Value Yield Equity Trust, the American Century fund, the four comparators that Dr. Pomerantz uses in his four models. So in Model 1, it's a Vanguard Value Index; Model 2, the Vanguard Institutional Index; in Model 3, it's the Dodge & Cox Stock Fund; and in Model 4, he maps it into the American Century Equity Income Fund. So in Model 4, there's no calculation of damages here because this is for the longer period, or let's see --

Q. It's both periods I think.

A. Whoops. Excuse me. I hope somebody knows how to erase those marks.

THE COURT: You have control of that, Mr. Nemser.

MR. NEMSER: Oh, do I?

THE COURT: Yes, sir. Okay. There you go.

MR. NEMSER: Great.

A. But this illustrates -- this is just another example of -- it's the same at-issue fund, and depending on which particular comparator you choose, you either find damages of $1.8 million or negative damages of $1.4 million. So it's -- it's a big range. And it's -- it's just dependent upon which particular index you happen to choose.

MR. NEMSER: All right. I move to admit DX 875, please.

THE COURT: Any objection to 875?

MR. ENGSTROM: No objection.

THE COURT: Thank you. It's admitted.

(Defendants' Exhibit 875 admitted in evidence.)

Q. And did you look at the differences in damages across the models for the other at-issue funds?

A. Yes, I did.

Q. And overall, what did you find?

A. I found that these examples are -- are -- are -- there are many examples of this type across the various at-issue funds.

Q. And so given the inconsistency that you get, let's say -- we can look at the one that's up on the screen now for -- for U.S. Value Yield Equity Trust, if you wanted to figure out

what the damages are that Dr. Pomerantz would choose or that you would choose if there's a way for this particular fund, how would you pick?
A. Well, I don't think there is any -- any basis for picking. I think it's essentially an arbitrary choice. If -- if we -- as this -- Dr. Pomerantz's sort of assumption is that if the Retirement Committee had performed in the loyal and prudent process, they could have selected any one of these options. There's really no guidance or no basis for choosing one over the other. Yet the damage number varies significantly, depending on which fund, which alternative fund you choose. So -- and to the extent that that's an arbitrary choice, you're not measuring damages. You're -- you're measuring the difference between your fund and the one that you happened to choose.
Q. So if the models, Models 1 through 4, were valid and reliable, what would you expect to see in terms of consistency across the rows of the chart?
A. I would expect to see similar values across the charts and not large swings of multimillions of dollars, depending on which particular comparator I chose.
Q. And what does that tell you about the models?
A. It tells me that we're -- that Dr. Pomerantz is likely not measuring the impact of the alleged misconduct, that he's actually capturing other things in his estimate of damages.

Q. And by the way, you -- you see these inconsistencies in both time periods, in the April time period and in the longer time period?
A. Yes. They're -- they're omnipresent across the whole period.
Q. And is that further evidence that there's a problem with the reliability of these models?
A. I believe it -- it is.
MR. NEMSER: I so move to admit DX 875. And I also forgot to move the admission of the gold chart, which was DX 874. So I move both.
MR. ENGSTROM: No objections.
THE COURT: Thank you. 874. I have 877 is the gold fund analysis.
MR. NEMSER: Oh.
THE COURT: But I may --
MR. NEMSER: There may have been another. Oh, yeah. 877 was the graph, I guess, and 874 was the table.
THE COURT: Would you put 874 back up just so I can get oriented to that?
MR. NEMSER: Sure. Chris, could you do 874?
THE COURT: Please. That's 874?
MR. NEMSER: Yeah.
THE COURT: Hold on here just a second.
MR. ENGSTROM: I believe 877 has already been

admitted.

THE COURT: Okay.

MR. NEMSER: Right.

THE COURT: Okay. So -- and there's no objection. 874 will be admitted.

MR. NEMSER: And 875, please.

THE COURT: Yes, sir. 875 as well.

(Defendants' Exhibits 874 and 875 admitted in evidence.)

MR. NEMSER: Thank you, Your Honor.

Q. So the next of your items in terms of the overall flaws involve different risk profiles. Chris, could you pull up DX 876, please?

So let's talk about this flaw. What is the flaw, and how do you analyze it?

A. So the -- the problem I'm identifying here is that in many instances, the at-issue fund and the replacement fund have different what I call risk profiles, have different risk characteristics.

Q. So what are those, risk profiles? Sorry to interrupt so early.

A. Sure. The risk profile -- I use that term just to mean that they have different exposures to different risks. You can think about many dimensions that affect risk. We talked about like the size of whether you're investing in small stocks or large stocks. Are you investing in domestic stocks

or emerging market stocks? Are you investing in a growth strategy versus a value strategy? Typically, analysts will breakdown an alternative into various dimensions that characterize risk. And to the extent that there are differences between the at-issue fund and the replacement fund in the risk profiles of those two alternatives, we're going to see differences in returns over the damage period that -- that are a result of these different risk profiles that don't necessarily have any relationship to the alleged misconduct.

So if we replace one fund with a certain risk profile -- let's say it's an emerging market fund and you map that into a more general global fund, you know those -- it's likely that those funds are going to perform differently. And if -- if that difference isn't a breach that you're trying to cure, if it's just because you happen to chose a -- choose a fund that has a different risk profile, then any difference that you're measuring is -- is a result of that risk profile difference. It's not a result necessarily of a breach that you're trying to address. And so that's the general idea that -- that I'm identifying here. And I think it creates problems for Dr. Pomerantz in his damages models.

Q. So did you evaluate specific alternatives in Dr. Pomerantz's models and look at their respective risk profiles?

A. I did.

Q. And what did you find?

A. I found that there were instances where there were differences in -- in risk profiles between the at-issue fund and the alternative fund that -- that didn't address an underlying alleged breach.

Q. So let's look at an example, please. Did you make a demonstrative relating to the Heritage Fund?

A. I did.

Q. Can we pull up DX 878, please?

And so what does this show?

A. So this shows the -- for the American Century Heritage Fund on the top line, and then it shows the -- the four models that Dr. Pomerantz estimated damages under. In Model 1, he chose the Vanguard Mid Cap Growth Index Fund. And in Models 2 and 4, he chose the Vanguard Extended Market Index Fund. And in Model 3, he chose the T. Rowe Price Mid Cap Growth Fund.

So the Heritage Fund is categorized as a Mid Cap Growth Fund. It -- it has a particular investment strategy that's implemented. And when it's implemented, it results in a certain distribution of stocks in the different risk categories. So I'm looking here at one particular one. This is the -- focuses on market capitalization. So for the American Heritage Fund -- American Century Heritage Fund, for example, you can see that 36 percent of its holdings are categorized as large stocks, 57 percent are categorized as mid

size stocks, and 7 percent are categorized as small stocks.

If we look at the alternatives against which Dr. Pomerantz is comparing the American Century fund -- and I think focus for the moment on Models 2 and 4, the Vanguard Extended Market Index Fund, you'll see that those funds are -- or that fund is much more weighted towards small stocks, has much less assets in large stocks, and actually less in the mid cap category as well. But to the extent that the market for large stocks is performing differently than the market for small stocks, we will see -- or we would expect to see a difference in the performance of these two investments that relates to that different risk exposure to market capitalization.

And the question is, is -- is there any reason why the alternative fund should have a different exposure to market capitalization based upon the alleged breach? There's not. There's no -- there's no reason why this difference -- or this difference in the resulting calculation of damages that arises from it doesn't have anything to do with a breach related to the American Heritage fund. It just has to do with the particular alternative fund that Dr. Pomerantz happened to choose. And there --

Q. Well, Dr. Pomerantz himself in Models 2 and 4, I believe, was mapped all of the small cap funds and all of the mid cap funds in the American Century menu into this one extended

market fund; is that right?
A. That's right. He mapped several. I forget -- it might have been six, something on that order.
Q. It might have been eight I think.
A. Six or eight of the American Century funds into this Vanguard Extended Market Index Fund. And the logic was that, if you'll remember, I think there was an exhibit that was called like the tic-tac-toe exhibit that had -- it was market capitalization across the top, mid -- large, mid, small. And then it had value, blend or growth, value -- growth, blend and value, and that creates a three by three matrix. And the extended market index fund covered, I think, six of those boxes. So it -- it invests in a range of different types of stock.
And so Dr. Pomerantz maps a lot of American Century funds into that extended market index fund because it does cover a broad range of -- of styles. But the problem is if -- if the fund that you're mapping in there is in only one of those boxes, it's say a blend -- large cap blend, you're mapping it into the extended market fund that actually covers a much broader set of -- of types of strategies, there's going to be a difference in performance between those two that Dr. Pomerantz calls damages that just result from the fact that he's mapping one type of risk profile into a -- an alternative fund with a different type of risk profile.

That's not damages. That's -- that's an artifact of the particular alternative that he's chosen as -- as the alternative so --

Q. Is there another part of Dr. Pomerantz's reasoning that that implicates, which is that as a result of mapping, let's say American Heritage -- I'm sorry, American Century Heritage Fund, which is the mid cap growth fund, into this fund that takes up six boxes on the tic-tac-toe board, that -- along with these other funds, which he also maps into this, is that going to reduce people's choice in terms of their ability to pursue specific strategies?

A. Well, there's a -- there is an implication across -- really, across all of Dr. Pomerantz' models about this -- the fact that his -- his menus are restrictive. They change the -- the types of strategies that participants are able to pursue. And he -- he sort of forces people from a choice that they've made into some alternative that may or may not look at all like the alternative that they've chosen. And there's -- there's two aspects to that. One, is that going to dissuade people from investing, or are they going to invest differently if the option that they've chosen and prefer is no longer available and now they're -- they're forced into some other alternative.

Q. So this demonstrative, DX 878, focuses on market capitalization, right?

A. Yes.
Q. And we've just been talking a bit about style or strategy, which involved growth and blend and value and things of that kind, right?
A. Yes.
Q. So are those also factors that drive results? Do they affect risk profile?
A. Yes. This is just really an example that's focused on market capitalization, which was one of those dimensions. There -- there are several other dimensions, you know, geographic concentration, investment style. So this is just meant as an example, really.
Q. On the style side, am I remembering right that Dr. Pomerantz testified that if -- if a fund that you bought as a growth fund drifted into becoming a value fund, turned into a value fund, that that would be dangerous?
A. Yes. I think -- I don't know which way he -- he said --
Q. It might have been the other way. I don't know.
A. Growth to value or value to growth. But he said -- yeah, when that happens, that can be dangerous. And, I mean, I think that's -- I wouldn't disagree with that. I think that just exemplifies the fact that it matters whether you're mapping a growth fund into a value fund or into a blend fund. And the performance is going to be different, and it doesn't necessarily relate to damages at all.

MR. NEMSER: So I move to admit DX 878, please.
THE COURT: Any objection?
MR. ENGSTROM: No objection.
THE COURT: Thank you. 878 is admitted
(Defendants' Exhibit 878 admitted in evidence.)
Q. And did you do another analysis in which you evaluated different risk profiles related to Morningstar categories --
A. Yes, I --
Q. -- for Exhibit 2?
A. Yes, I did.
Q. Now we've looked at a similar one for Exhibit 4 --
A. Yes.
Q. -- for Model 4 I mean?
A. For Model 4, yes.
Q. I'm sorry. I said exhibit, but I meant model. Let's pull up DX 800, please.
So this is from your report?
A. Yes.
Q. And it's similar to the one we looked at for Model 4, but this one is focused on Model 2?
A. Correct.
Q. And it shows that there are differences in the Morningstar categories between the fund that is the American Century Plan's actual fund and then the Model 2 fund that Dr. Pomerantz chose and mapped things into, right?

A. Yes.

Q. Okay. And as before, the right-hand column with all the Xs shows a mismatch?

A. That's correct. Where the at-issue fund is in a different Morningstar category than the -- the alternative that Dr. Pomerantz replaces the American Century fund with.

Q. So let's -- let's take Disciplined Growth, which we've used a bunch of times, and talk about that one.

A. So Disciplined Growth has a Morningstar -- the American Century Disciplined Growth Fund has a Morningstar category of large growth. And the -- Dr. Pomerantz maps that into the Vanguard Institutional Index I Fund, which is a large blend strategy. That's the Morningstar category. So this -- as you can see, this is pretty common in Model 2 where there's a mismatch because, as you'll recall, Model 2 is where we have that slimmed down menu of only six or seven Vanguard options.

So because there's such a limited number of options, there's a lot of quite diverse funds being mapped into just this small number. And that creates this kind of mismatch. And it creates the -- the illusion, or I call them phantom damages where what we're really measuring is, hey, we're going from a -- in this case, a large growth to a large blend, and there's going to be a -- there's going to be a difference in performance. But is that really measuring any consequence of the alleged misconduct? And I think the answer is there's no

reason to believe it does.
Q. And my memory at least was that there were five distinct funds in Model 2 and then there are target date funds?
A. That's right. So they're the five plus the target date, which are some combination of those.
Q. And was there evidence that Dr. Pomerantz accepted when he was testifying that according to the Hewitt report about 10 percent of plans had seven or fewer options?
A. That's right. I think, you know, he acknowledged that a plan that is this restrictive is really sort of an outlier among plans, that most plans have many more options than five plus a target date option.
Q. So returning to the chart that we -- the Morningstar chart. Let's go to the end of it, please.
What do you find in terms of the amount of mismatches?
A. Well, I find that out of the 65 at-issue funds, that's counting the target date funds separately, I find 36 instances where he's mapping from one Morningstar category into a different Morningstar category, which is about 55 percent of the cases where there's this mismatch problem.
Q. Okay. So we've been talking about Morningstar categories in terms of risk profiles. But in your report, you talk about something called prospectus benchmarks as another way to think about it. So what's a prospectus benchmark?

A. Every fund, by SEC regulation, has to identify a benchmark. And it's reported in the prospectus. Sometimes there are more than one benchmark. There's a primary and a secondary benchmark. And it's designed to provide investors with sort of a comparator against which they can judge the performance of the -- the fund. And it gives you an indication of the style and the investment strategy of the mutual fund. And so it's -- it's a -- I think of it as a complement to the Morningstar category.

Q. And did you examine the prospectus benchmarks that -- of the alternatives that Dr. Pomerantz used and compare them to the American Century ones?

A. I did.

Q. In general, what opinion did you form?

A. I found many instances where they -- as we would expect, there are different prospectus benchmarks between the at-issue fund and the alternative into which Dr. Pomerantz maps these -- these -- these investment funds. And that's I think a further indication, consistent with what I found in the Morningstar categories, that -- that there's a potential shift in the risk profile between the at-issue fund and the alternative fund.

Q. Did you make a demonstrative showing the example?

A. I did.

Q. Could we call up DX 879, please?

So this is showing a comparison with respect to the American Century Real Estate Fund, right?

A. That's correct.

Q. Okay. So what do you see here?

A. So here I've listed the -- the four models and the -- and there are actually just three alternatives that Dr. Pomerantz uses as the benchmark alternatives, Models 1 and 3. So the prospectus benchmark for the American Century Real Estate Fund as shown in the top in the brackets there, it's MSCI US REIT Gross Return Index and -- or benchmark -- excuse me, prospectus benchmark. And you can see that the first alternative Model 1 actually uses a fund that has the same prospectus benchmark as the American Century Real Estate Fund. And in that case, you can see the damages -- I guess they're negative damages there. But at any rate, those are small value. So they're tracking similarly.

In Models 2 and 4, the -- Dr. Pomerantz selects a -- a replacement fund that has a prospectus benchmark of the S&P 500 Total Return Index.

Q. So that's a broad, large cap kind of index?

A. That's right. So the -- the -- those funds are -- are tracking against this prospectus benchmark that indicates that there's -- they're quite different in -- in nature. It's a large equity blend fund. And you can see there are large damages associated with those Models 2 and Models 4. And

that's really an artifact of the fact that he's now comparing this real estate fund to a broad market index.

And in Model 3, in contrast, that's another real estate related prospectus benchmark, the FTSE All Equity REITs Index. And you can see there also, the American Century Fund -- Real Estate Fund shows negative damages when compared to a more comparable prospectus benchmark, even though it's different.

Q. Okay. And did you look more broadly at the prospectus benchmark issue with respect to the at-issue funds in Dr. Pomerantz's comparators?

A. Yes.

Q. And in broad terms, what did you find?

A. I found that there was -- there were many, many instances where the prospectus benchmark of the at-issue fund was different than the prospectus benchmark of the alternative that Dr. Pomerantz uses.

Q. Okay. Let's move on to the next of your categories of flaws. And this is 881. DX 881, please.

And this one is the models ignore nonperformance attributes of at-issue funds?

A. Yes.

Q. And this is the last actually of the sequence because the final one, which related to the reduced choice and the failure to take into account participant preferences is something

we've been touching on throughout, right?

A. That's correct.

Q. Okay. So we had a little discussion up at the beginning about what a nonperformance attribute would be. But what are some examples of nonperformance attributes?

A. So the -- just to recall, these four damages models calculate, of Dr. Pomerantz', what I call underperformance damages. So they're just looking at the difference in asset value between what actually happened and Dr. Pomerantz' alternative investments. The -- so returns are important definitely for investors, but investors also choose options for nonperformance related factors. In particular, they choose actively managed funds because those do things that you can't accomplish with a passive fund.

So, for example, an investor may want a defensive strategy that is not tracking a particular index but that's part of an active management strategy that a fund manager might employ. Alternatively, there -- in addition to a defensive strategy that allows the fund manager to reduce the risk, there are also -- with actively managed funds, there's the opportunity to outperform the prospectus benchmark, which in a passive fund, that's never going to happen. In fact, they're always going to underperform the benchmark because there's -- there are fees involved. So a -- an investor may value this ability to not track an index and be exposed to the

movement of index but to have either a defensive strategy or a more aggressive strategy where they may be hoping to outperform the index.

So what this results in is, for actively managed funds, there's a bigger variation in expected returns for actively managed funds because they can perform either above or below the index at any particular -- you know, for any particular period. So, for example, in a -- in a bull market, a defensive passive strategy may underperform the benchmark. Whereas in a bear market, it may outperform the index. So essentially, by failing to consider these nonperformance attributes, Dr. Pomerantz is failing to acknowledge that investors and Plan participants may actually choose an active strategy that performs differently than the benchmark by design because that's what they would like to invest in as opposed to investing in something that moves with the index.

Q. And all -- as we talked about back at the beginning, all he's looking at is net performance of the at-issue fund and net performance of whichever comparator he's chosen for his model, and he's not paying any attention to those nonperformance attributes?

A. That's correct.

THE COURT: Okay. We're about -- we're ready for a break if you are, Mr. Nemser.

MR. NEMSER: Yes, Your Honor. Actually, I forgot to

offer two documents. It might be a good moment to do it. It should take about a second.

THE COURT: All right. Yes, sir.

MR. NEMSER: Okay. I move to admit 879, which was the chart on real estate. Could we pull that one, Chris? DX 879.

THE COURT: Let me find it here.

MR. NEMSER: We have it up now.

THE COURT: I got you. Okay. And what else are you going to offer?

MR. NEMSER: And also offer DX 800, which is the piece from the report on Model 2 and Morningstar.

THE COURT: Okay.

MR. ENGSTROM: No objection to either of those two.

THE COURT: Thank you. 800 and 879 are admitted.

(Defendants' Exhibits 800 and 879 admitted in evidence.)

THE COURT: Okay. We'll take a 20-minute recess since this is our evening recess.

(Recess at 3:00 until 3:23 p.m.)

THE COURT: I'll just -- I was secretly hoping that we'd be done today, but that's not the case I understand. Do you think you'll be done with direct today, Mr. Nemser?

MR. NEMSER: Oh, I do.

THE COURT: Okay. Good. Great. Great. I know that Mr. Engstrom is chomping at the bit to get involved here.

MR. NEMSER: No question.

THE COURT: Yes, sir.

Q. So we were talking about the -- this -- this area of flaw. The models ignore the nonperformance attributes of at-issue funds. And we were talking about the issues about the taking into account that active and passive funds are -- have different attributes, and different things are valuable about them. Is that right, Doctor?

A. Yes.

Q. And that -- I don't know if I asked you this. I think you said it, but I'll just ask you now. So it's your view that Dr. Pomerantz did not give adequate consideration to the nonperformance attributes of at-issue funds?

A. Yes.

MR. NEMSER: Chris, if we could have DX 1019, please. Next page, please.

And this is Dr. Pomerantz's declaration from the Moreno case, which was offered as his direct testimony, which we showed in -- in his dep- -- in his testimony the other day. And if we could go to pages 28, 29. The particular sentence -- and I'm not sure where it falls on the page -- is the one that begins, "If a fund was chosen in part because of its more conservative approach..."

THE COURT: Could you highlight that? Thank you.

Q. Let's see.

A. At the bottom of 27? Is that where you're reading I think.

Q. It could be.

THE COURT: Yeah. The last -- the last sentence, the very end of the last sentence, "Similarly, if a fund was chosen in part..."

Q. There we are. And on to the next page down to "bull market." Great.

So Dr. Pomerantz said in his declaration, If a fund was chosen in part because of its more conservative approach to a particular asset class, a fiduciary should not be overly concerned when the investment underperforms its peers during a period in which the asset class is experiencing a bull market.

Do you recall that part of the cross-examination here?

A. Yes.

Q. Does Dr. Pomerantz's statement in his declaration in Moreno affect your opinions with respect to Dr. Pomerantz's approach to nonperformance attributes?

A. No. I think it's -- it's consistent with my view and my criticism. And I think it only supports the conclusion.

Q. And so one of the benefits of active management, as you've said, is -- at least one way it can go is -- is a conservative approach, the same toward downside risk?

A. Yes.

Q. And -- and so to evaluate the performance of such an actively managed fund in a bull market without taking into account its purpose is a problem; is that right?
A. It is a problem. I think it's -- it's -- if you're measuring that and attributing that to damages, then I think that's a mismeasurement of damages.
Q. And so this overall -- that's an example, but overall, this failure to take into account the nonperformance attributes can -- can lead to attributing damages in a situation where damages should not be properly attributed?
A. That's correct. This is just an example, but it's an example of a general problem.
Q. So let's talk specifically about Model 1. What's your opinion -- well, first briefly, what does Dr. Pomerantz do with Model 1 in terms of the passive vehicles versus the active?
A. In Model 1, Dr. Pomerantz replaces the entire American Century lineup of actively managed funds with what he considers to be comparable Vanguard passive alternatives.
Q. And so what's your opinion of the way he's chosen to use these passive funds to replace the entire menu of the American Century Plan?
A. Well, I -- I don't believe that the alleged misconduct requires the replacement of all actively managed funds with passive funds. So I think this is an instance where the

solution or the alternative that he's proposing goes well beyond the -- the required action in order to address the alleged breaches.

And as a consequence of that, he's -- he's mapping active funds without regard to the nonperformance attributes into passive funds and creating a lot of noise, creating a lot of measured damages that don't really derive from the alleged misconduct.

Q. And what -- well, suppose the alleged misconduct -- we talked about this earlier, and I don't want to repeat extensively, but suppose the alleged misconduct were just a failure to add passive funds rather than replace them all?

A. Yeah. I think that's a -- that's an example. If the issue is, for example, to control costs or to add index funds, that's -- there's a solution short of completely eliminating passive funds and substituting -- excuse me, completely eliminating active funds and substituting passive funds that would address that alleged breach that would have a very different damage value associated with it, if any.

If passive funds were added to the menu and they were adopted gradually over time, as we've actually seen in the -- in the actual first American Century menu, that's quite a different alternative than taking all the dollars that are in passive -- actively managed funds and just on day one moving them into passively managed funds.

Q. All right. What if the breach in question were a failure to control costs, would Model 1 be an appropriate way to measure whether there's an economic loss or damages from a failure to control costs?

A. I don't think so. I think what a damage expert should do in that circumstance is put themselves in the place of -- in the but-for world. So we have -- we know what happened. We know how the Retirement Committee evaluated the situation and their actions. And the question is, if that Retirement Committee was attempting to control costs in a way that meets the -- that satisfies the plaintiffs' complaint, what would they have done? I mean, that's really the question that we're trying to simulate in the but-for world.

And I see no evidence that, you know, the expected outcome of that sort of process would have been the replacement of all American Century funds with Vanguard passive options. It just -- it doesn't ring true to the circumstances and facts of the case to me as a plausible alternative but-for world.

Q. Another question. So Dr. Pomerantz testified that his passive lineup in Model 1 was the best unbiased approximation of how the market performed. Do you recall that?

A. Yes.

Q. And he talked about William Sharpe, and he talked about using passive comparator to measure the performance of a

mutual fund. So was Dr. Pomerantz wrong?

A. Well, I -- I don't think -- well, first of all, I don't think Bill Sharpe is wrong. I think that may be a fine way to evaluate the performance of an active manager. But that's something different than the question of is that the appropriate way to measure damages in a case such as this.

In a case where the alternative funds are actively managed, we know that those are going to have a wider range of potential performance relative to passively managed funds because they're -- they have active strategies, and sometimes they're going to underperform the benchmarks. And hopefully sometimes they're going to overperform the benchmarks. But there's a wider range of expected performance than if you're tracking strictly to a passive fund.

So I don't agree with -- I don't disagree with the general concept that to evaluate an active manager over a -- over an entire market cycle, an up cycle and a down cycle, it can be informative to compare that performance to a passively managed index fund. But that's -- that's a different question than what's the right way to calculate damages in -- in this circumstance.

Q. And you just talked about over a whole market cycle, but damages are calculated over some legally determined time period. Does that affect your answer?

A. I think it -- yes, it does affect my answer. The -- the

fact that -- that we're tracking -- or Dr. Pomerantz in the case of Model 1 and Model 2 is tracking to -- to a passive alternative or an index, in order for that to be a valid comparison against actively managed funds, you need both an up cycle and a down cycle. You need to look at an entire market cycle to evaluate whether an actively managed fund under or outperformed a passive alternative.

So since we've been, during the damage period at issue here, in a long bull market, this time period doesn't allow you to make that sort of assessment just by comparing to a passively managed fund. You have to accommodate that consideration in some other way. And one of the ways you can do it is to look at a range of alternatives instead of just a single passively managed fund.

Q. Now, by and large, over the class period, the American Century Plan has consisted of actively managed funds, right?

A. Yes.

Q. And is it your view that the Plan participants preferred American Century actively managed funds?

A. Yes. I think there's -- there's evidence that I talk about in my report that -- that supports that view.

Q. Okay. And did you make a demonstrative relative to that?

A. Yes.

Q. Could we pull up DX 882, please.

So what is DX 882?

A. So this just summarizes some points in my expert report, some -- some features or -- or facts or events that indicate that American Century Plan participants preferred American Century funds.

Q. Okay. And could you explain the first one about transferring outside account balances?

A. Yes. So first I looked at when someone first joins American Century, if they've been employed somewhere else, they may have a defined contribution plan. And they have options when they leave a former employer and come to work at American Century. They can typically leave their funds in their old plan, they can move their funds to an independent retirement account, or they can bring those funds into the American Century Plan.

And so to the extent that Plan participants or new employees are bringing funds from a prior plan into the American Century Plan is an indication that they're satisfied with or they are attracted to or they like the investment lineup that's available in the American Century Plan. So we see over this period from 2010 to 2015 about $7.1 million in assets were transferred into American Century Plan from -- from prior employers.

Q. Okay. And the next one talks about former employees.

A. Yes. This is just the -- the flip side of that. When somebody leaves American Century, they have the option of

leaving the -- their -- their Plan assets in the American Century Plan. If they're retiring, they could move those into an IRA account or even if they're just moving to another employer, they can move them into an IRA. Or if they're going to --

Q. And you mean an individual retirement account, right?

A. Yes. An individual retirement account. Or if they're going to a new employer with a defined contribution plan, they can move those American Century funds into their new employer's defined contribution plan. And so those -- those people who leave the employ of American Century, decide to leave their funds in the American Century Plan are indicating that they are satisfied with the options on the American Century menu, which were all American Century funds.

I think actually the named plaintiff, Mr. Wildman, is an example of this category. He left American Century in 2008, decided to leave his funds in the American Century Plan. At his deposition, he said that he did that because he wanted to -- to remain in the American Century funds and wanted to maintain a diversified portfolio. So it's an example of -- of the second category.

Q. Okay. And on the last item, here you have that the PCRA was used to invest in American Century funds (and active funds)?

A. Yes. I -- so I looked at the PCRA investments because

in -- in the PCRA, Plan participants have an option -- the option to invest in a whole array of different types of plans. And so I looked specifically at mutual fund investments in the PCRA since those are the investments that are classified as to active or passive. And overwhelmingly in the -- in the PCRA for investors who invested in mutual funds, there was a preference for actively managed funds. And within actively managed funds, there was a preference for American Century funds. I think relative to the next largest fund family, American Century had five times the assets in actively managed American Century funds as compared to the next most frequently subscribed actively managed fund family, which I think was Schwab was the second one. So there's a five to one difference.

Q. So we'll show a -- a graph in a second. You made a bar graph about that?

A. I did.

Q. Okay. Before we do, let -- I'd like to move DX 882 into evidence, please.

MR. ENGSTROM: Yeah. I object, Your Honor. This doesn't satisfy the criteria for a demonstrative. It's not a summary of voluminous exhibits or anything. He's given testimony to this effect, but I don't think that this is necessary as an exhibit.

THE COURT: Mr. Nemser?

MR. NEMSER: Well, Your Honor, I suggest that it identifies three areas that are the -- form the basis of the expert's opinion and also supplies data. The reason we used it was because it supplies some data that he -- he relied on in --

THE COURT: It's in the report. I think you introduced this to me in this testimony that it's in the report, and it's gleaned from that report. And I suspect I may have looked at his report. I probably have. I don't recall the actual page length, but it's a lengthy report. Given his testimony today, I suspect it's lengthy, right? How long is it? A hundred pages?

MR. NEMSER: I'm not sure I know the pages, Your Honor. It's a lot of pages.

THE COURT: It's a lengthy report?

MR. NEMSER: It's a lot of pages.

THE COURT: And I'm going to -- go ahead. You got something else, Mr. Engstrom?

MR. ENGSTROM: Yes. For it to qualify as a demonstrative as such, it would have to indicate what the sources are of that data and provide notations as to the origins of it. And it doesn't have those to indicate the underlying services.

MR. NEMSER: Well, we can cite to pages in his report, Your Honor. You're right, they are in the report.

THE COURT: Yeah. Why don't you cite to pages in the report. And I'll admit it if you'll do that for us.

MR. NEMSER: Thank you.

THE COURT: DX 882 is admitted.

(Defendants' Exhibit 882 admitted in evidence.)

MR. NEMSER: Thank you.

Q. So going to the demonstrative, the graph that we were talking about a second ago, that's DX 883. And is this the bar graph you were just talking about?

A. That's right. It is.

Q. And what is it showing? I know you were kind of almost getting to describe what -- what the data showed?

A. Yes. So this is -- the set of data I'm looking at are the investments of Plan participants in mutual funds in the PCRA. So when you look at that set of investments, I'm showing there in the green bar that participants invested $3.3 million through the PCRA in American Century actively managed mutual funds. By comparison, if you look at the bar on the right, that -- those are also investments in the PCRA mutual funds, but those are to the next most frequently subscribed plan sponsor. In that case, it's Schwab. And -- and that family had about $600,000 invested. So among PCRA participants who invested in mutual funds, actively managed mutual funds, you can see there was a -- you know, a dominance of dollars in the American Century fund relative to the nearest competitor,

which was Schwab.

I also looked at -- within that same group, these are PCRA investors in mutual funds -- the total amount that was invested in index mutual funds through the PCRA. And that total was that blue bar in the center of $1.6 million. So those that invested in American Century actively managed mutual funds in terms of the dollar investment was about twice the amount that was invested in all index mutual funds through the PCRA.

So this, to me, just confirms what the other two observations were is that there appears to be data supporting this idea that the American Century Plan participants demonstrated a preference for American Century plans over other actively managed -- excuse me -- funds. They preferred American Century actively managed funds over other actively managed funds. And this also shows a preference for -- for actively managed funds over index funds.

Q. And you looked at mutual funds here. Why did you look -- why did you focus on mutual funds in this analysis?

A. Because mutual funds are categorized as to active and passive management. There -- there's another group of -- of investment options within the -- or investment alternatives within the PCRA, exchange traded funds, or ETFs as they're called. But they're not categorized as to active or passive. So I didn't include that in this analysis. It's limited to

mutual funds through the PCRA window.
Q. So in his Models 1 to 3 -- 1, 2 and 3 -- Dr. Pomerantz does not keep any of the American Century funds in the Plan, right?
A. That's correct. He --
Q. And in Models 1 and 2, he replaces the American Century funds with Vanguard funds, right?
A. That's correct. Passively managed Vanguard funds.
Q. Is Dr. Pomerantz's way of constructing the models consistent with the data that you found with respect to the participant preferences in the American Century Plan?
A. No. I think it -- it ignores the -- the revealed preferences of the Plan participants for -- for both actively managed funds and American Century funds in particular.
MR. NEMSER: I move admission of the bar graph, DX 883.
MR. ENGSTROM: No objection.
THE COURT: Thank you. 883 is admitted.
(Defendants' Exhibit 883 admitted in evidence.)
Q. So, actually, if we could pull up DX 867 now, please.
I think we've now talked about each of these items, except for the last, which is one which you've addressed throughout, and even -- even on that, we were just talking about participant preferences. Is that fair, Doctor?
A. Yes. That's right.

Q. And these critiques that you have lodged, most of them apply to more than one of Dr. Pomerantz's models, and many of them apply -- or all of them apply to some of the models; is that fair?

A. That's correct.

Q. So do you also have some model specific critiques that would only apply to one model?

A. Yes. I think they're -- each of the models has their own kind of overarching issues.

Q. So could you give us just a few examples of those model specific critiques that you have?

A. Sure. I think -- we've just been talking about one, which is the -- the complete replacement of American Century options with Vanguard options. And that -- that is the case in Models 1 and 2. In Model 2, in addition, there's this extreme limitation of the Plan menu to five options, which I think is unrealistic in terms of the but-for outcome. And it also creates other problems with mappings that we've talked about. So Model 2 suffers from that additional issue.

Model 3 -- I think a key issue with Model 3 is that Dr. Pomerantz himself has testified that he doesn't think that the Model 3 lineup would be the lineup from a loyal and prudent process, which I think in itself sort of excludes Model 3 as a valid potential measure of damages.

And then Model 4, we've talked about the disconnect

between the Hewitt recommendations and the -- and the lineup that's in Model 4. And I think that also makes Model 4 defective at a very fundamental level.

Q. Okay. So -- I'd like to -- put that down now, Chris. Thank you.

One area which has -- we've already talked about in the context of the Hewitt model, Model 4, but not so much in the context of Models 1 through 3, is Dr. Pomerantz's position that Plan participants were harmed by the lack of a stable value fund?

A. Yes.

Q. And do you agree with Dr. Pomerantz's position?

A. I don't think there's any evidence supporting that idea. So, no, I don't agree with that.

Q. The Court's already heard a lot of testimony about the differences between a money market fund and a stable value fund. And I don't -- I don't want you to get into it at any length. But if you could for -- state so that everyone understands what your position is, what briefly do you see as the differences?

A. Yeah. Well, I -- there's a number of differences between the two, as reflected in the Morningstar categorization of the two assets. So that's -- that's evidence. But they're fundamentally different products. They have different underlying assets that they're invested in. They have

different risk and return characteristics. And, in particular, stable value funds are subject to restrictions in trading and liquidity that money market funds are not subject to. So in my view -- and particularly in relation to damages, to substitute -- take money from a money market fund, place it into a stable value fund is an example of a mismatch of -- of the at-issue fund to the alternative. And it creates phantom damages when, in fact, all you're measuring is the difference between the performance of those two different asset classes.

Q. So are there plans that offer both money market and stable value funds?

A. Yes. There are many.

Q. What's your basis for saying that?

A. Well, the testimony I've read, but some -- a couple of studies that I quote in my report.

Q. Okay. So if we could go to DX 864.

Is this a -- one of the documents that you quoted in your report?

A. Yes, it is.

Q. And it's a -- it's published by Vanguard?

A. It is.

Q. And it's called Money Market Reform and Stable Value: Considerations for Plan Fiduciaries?

A. Yes.

Q. So -- and it dates from August 2016?

A. Yes, it does.

Q. So if we could please go to page 7. And, Chris, if you could call up the conclusion paragraph at the -- paragraphs at the top left of the page.

Doctor, is this material that you're relying on?

A. Yes, it is.

Q. And in what way are you relying on it?

A. Well, it's a statement about the requirements for a defined contribution plan in terms of whether one or the other of these two capital preservation alternatives must be offered on a -- by a fiduciary.

Q. And what do they say?

A. Well, it says, A plan's fiduciaries are not required to offer any particular type of investment as the plan's protected-principal option. In reviewing money markets versus stable value in this regard, fiduciaries should undertake a prudent process to understand and evaluate the comparative benefits and risks of each investment vehicle and then make a reasoned choice. As this paper has described, either vehicle may be an appropriate investment option.

THE COURT: Excuse me.

Q. So is that consistent with your understanding of Dr. Pomerantz's position vis-a-vis stable value funds?

A. Well, it's -- that's sort of difficult to say. I'm not sure that Dr. Pomerantz -- well, I'll say it's inconsistent

with what he implements in Model 4, and I think it's inconsistent with his calculation of damages for kind of this supplemental calculation that he does for Models 1 through 3 where he calculates stable value damages.

Q. Okay. So did he -- did he -- did you also look at some other sources with respect to plan's behavior in holding money market funds versus stable value funds?

A. Yes. I tried to look at the prevalence of both types of investments among --

Q. And did you do a demonstrative on that?

A. I did.

MR. NEMSER: Can you please bring up DX 889, Chris?

And I would, by the way, move admission on the Vanguard commentary, which is DX 864.

THE COURT: Any objection to 864?

MR. ENGSTROM: No objection.

THE COURT: That will be admitted.

(Defendants' Exhibit 864 admitted in evidence.)

Q. Okay. So what is 889 showing?

A. 889 summarizes information in two research reports that I relied on, the ICI report and a report by Met Life that are referenced and discussed in my report.

Q. And we discussed -- Dr. Pomerantz and I discussed the Met Life study, right?

A. I think you did, yes.

Q. And it indicates that a little less than half of defined contribution plans surveyed offered both a money market and a stable value fund?

A. That's correct.

Q. And, indeed, that 62 percent of defined contribution plans surveyed by Met Life offered a money market?

A. That's correct.

Q. And what did you find with respect to ICI?

A. ICI reports that 30.5 percent of 401(k) plans did not offer a guaranteed investment contract option, which is essentially stable value. That's primarily what makes up guaranteed investment contracts these days. And it also found that over 50 percent, 51.5 percent of the 401(k) plans surveyed offered a money market fund.

Q. Do you remember what the ICI source was?

A. I believe it was the Form 5500s. I'm not certain about that as I sit here, though.

Q. I just meant the ICI publication that you looked at.

A. Oh, it was an ICI publication from 2014.

MR. NEMSER: So I move admission of DX 889.

MR. ENGSTROM: Same objection, Your Honor. There's no citation to the underlying data within this. I also think that there's issues with it being misleading. And the ICI provides a lot of data for plans of different size. And absent any kind of citations, I don't think we have any way of

ascertaining the accuracy of this data.

MR. NEMSER: I believe --

Q. Are these cited in your report, Doctor?

A. Yes.

THE COURT: They're attached to your report?

THE WITNESS: Well, they're cited in my report.

THE COURT: Cited?

THE WITNESS: Yes.

MR. NEMSER: So, I mean, we can supply cites if that would help -- or page references from the report.

THE COURT: Would that help?

MR. ENGSTROM: That would be our preference, Your Honor.

THE COURT: Okay. Yeah. I'll admit it with the idea that they'll provide page references. Thank you.

889 is admitted.

(Defendants' Exhibit 889 admitted in evidence.)

MR. NEMSER: Actually, I have the cites here. I could read them into the record if that would be helpful, or we could just confer and I could give them --

THE COURT: Why don't you confer and give it to them.

MR. NEMSER: Sure.

Q. So overall, what is your conclusion with respect to the use of money markets and the use of money markets in

conjunction with stable value funds?
A. I don't think there's any evidence supporting the requirement that a fund not offer a money market fund and instead offer a stable value fund. And, consequently, I -- I don't think there's any support for the calculation that Dr. Pomerantz performs purported to be damages from failure to offer a stable value fund.
Q. And Dr. Pomerantz assumed as well that the money market would be replaced by the stable value fund, right?
A. That's right. It's not strictly a damage calculation that assumes that a new option, a stable value option is added to the menu. It's the elimination of the money market fund, the replacement with the stable value option, and the implicit assumption that people are going to invest in a stable value fund in exactly the same way that they actually invested in the money market fund, which I think is -- is not a reasonable assumption, given that they're different investment vehicles with different risk and return profiles.
Q. Okay. So -- so is it -- are you suggesting that it isn't reasonable just to assume that -- that all of the money that in reality was invested in money markets would flow directly into the stable value fund and stay there?
A. Yes. I think there's -- there's neither a motivation or requirement for that and -- but more specific to your question, I think this is an example of the failure to

consider Plan participants' revealed preferences, and an unreasonable assumption that people are going to behave in the way that Dr. Pomerantz in his model assumes they will, that they'll just accept the substitute alternative and not change their behavior in any way. I don't think there's a basis for that assumption.

Q. I want to change topics and go to Dr. Pomerantz's claim that the Plan's funds had excessive fees. Do you recall that?

A. Yes.

Q. And Dr. Pomerantz does not assert, I think he testified, that the -- the underperformance damages essentially include any calculation with respect to excessive fees, so you would not add them; is that right?

A. That's right. I think he -- he acknowledges that the four underperformance models incorporate excessive fees as part of that calculation. And so they're already accounted for in his four underperformance models.

Q. Okay. So we'll put that aside. At any rate, he presents various calculations to accompany his claim that the Plan charges excessive fees?

A. Yes.

Q. Okay. And how did he go about doing these excessive fee calculations?

A. Well, he compared the American Century Plan fees to several benchmarks that he constructed -- some that he

constructed and I think at least one that was reported in ICI.
Q. Okay. And so he has an ICI plan analysis he called it?
A. Yes. He has two. He has an ICI plan analysis and an ICI fund analysis. And then he has -- he uses three of his underperformance damages models to also construct -- I'll call it a benchmark of fees. And he -- he calculates damages by comparing American Century's actual fees to each one of these -- I guess there's five in total -- benchmarks.
Q. And so in terms of the ones based on the damages models, those are fairly simple to describe. They're -- he's just pairing off the at-issue fund, the fund that was the Plan's real fund, and he's -- on the other side, he's looking at the fee in whichever model it is that he mapped the at-issue fund into. And then he's -- he's calculating -- he's looking at expense ratios for the two and comparing them. Is that --
A. That's essentially what he does. He calculates a weighted average fees for his model alternatives and compares that to the -- what's the weighted average fees for the at-issue funds and calculates the difference between those to be damages --
Q. Okay.
A. -- or excessive fees.
Q. And then the ICI ones are a bit different -- and we'll come to them in a second, but -- so did you make a demonstrative related to your opinions regarding the fees analysis that Dr. Pomerantz made?

A. Yes.
Q. Okay. And overall, did you form an opinion about Dr. Pomerantz's fee calculations?
A. Yes, I did.
Q. And what was your opinion --
A. That --
Q. -- briefly?
A. That his analyses are flawed, and they don't provide any evidence that Plan participants or the Plan paid excessive fees.
Q. Okay. Chris, could you please call up DX 890?
And so DX 890, does that describe the flaws in fees analysis that you identified?
A. Yes. I think it summarizes them, yes.
Q. And please describe what you meant by these --
A. Well --
Q. -- just briefly, in a summary form.
A. Yeah. Very briefly. So the fail -- fails to consider fees in relation to the bundle of services. The -- in order to know whether you overpaid in fees, you have to know what it is you're paying for. So if it's a passively managed fund, for example, versus an actively managed fund, that's a different bundle of services that you're receiving from those two options. And so you wouldn't expect them to have the same fees. That's the essence of my first criticism.

Secondly, he fails to control for the fact that different benchmarks have different proportions of active or passively managed funds. And consequently, essentially, what he's measuring is just the -- the difference between the amount of active funds in the -- in American Century Plan versus the amount of active funds in the various benchmarks that he looks at. That -- that explains the difference. And then I find some additional flaws with the way he's constructed his ICI analyses in addition to those first two.

Q. Okay. On the first one -- I know we've talked a lot now about the difference between active and passive. And you don't have to repeat that. But in broad terms, what -- what are the types of services that you're talking about here?

A. Well, in -- in an actively managed fund, there's -- there are various fund management expenses as for research, for development of the strategy and implementation of the actively managed strategy. So there's -- there's fund investment analysis of fees and costs that are associated with actively managed funds. It's why actively managed funds have higher fees than passively managed funds where -- because passively managed funds are just replicating the performance of an index, and there's no such analysis and other costs associated with them.

Q. Now, you also said that -- a point there on that first bullet involved that you have to know what the person or what

the investor is paying for --

A. Yes.

Q. -- right? And is performance of the investment relevant to that determination?

A. Yeah. That's the ultimate thing you're hoping to gain by paying higher fees in an actively managed fund is higher gross performance that meets or offsets the fee -- the additional fees that you're paying for active management. So to evaluate fees, you have to look at the underlying performance of the fund that you're evaluating to determine whether you're overpaying for what you're getting in relation to the -- the active management returns.

Q. And did Dr. Pomerantz do that?

A. He did not do any sort of performance analysis in his fee analysis.

Q. Okay. Now, what about the use of Vanguard as his comparator when he's comparing active and passive fees, is -- we've talked about passive in general, but is there anything to be concerned about with the use of Vanguard as a comparator?

A. Well, Vanguard is a fund that operates at cost, so it's not a profit-making enterprise. So among the passively managed alternatives, Vanguard has lower fees because it's -- it's a fund that operates at -- or a family that operates at cost. So it's a particularly low active management -- or

passive management alternative in the sense that it has lower fees because it's -- it's not a profit-making enterprise.

Q. So let's turn now to these ICI analyses. Could you explain briefly what the ICI plan piece is and what the ICI fund piece is?

A. Yeah. So the -- we'll do the plan first. So basically, what ICI does is collect information on the fees paid by plans, 401(k) plans. And then it groups those into categories depending on asset size and I think other characteristics too. So, you know, as a -- as a plan gets larger, the fees tend to be smaller. So the idea is that they want to try to control for the plan size. And they group the -- they put funds of a similar size in a group and then calculate the average fees for a plan of that size and report those out separately. So that's essentially what's being done in the ICI plan analysis.

Q. And do you -- do you think that's an acceptable way to approach the analysis, to use that -- that plan average?

A. I think it's a good idea as far as it goes, but it's not sufficient because with -- let's imagine that we have funds of a similar size. That's one thing you want to control for. Another thing you may want to control for is --

Q. Did you mean plans of a similar size?

A. I meant plans of a similar size, yes.

Q. Okay.

A. So with plans of a similar size, that's certainly one

thing you'd like to control for. But even plans with a similar size, if two plans are invested -- if one plan is invested heavily in bonds and another plan is invested heavily in equities, equities tend to have higher fees -- Equity funds tend to have higher fees than bond funds. So if I'm comparing a plan that has a lot of equities relative to the average in the size category, I'm going to have a higher fee in that plan for a very good reason, because the participants have elected to invest in equities, which have higher fees.

To calculate the average difference between -- the difference between the average fees in that category and that plan's fees are going to, according to Dr. Pomerantz's methodology, are going to show up as damages. But it's not really damages. It's a result of just the investment choices of plan participants.

Q. Okay. And then there's this ICI fund approach. What's that?

A. All right. This is -- so this is an attempt to address that -- that issue. It's a bit complicated. The -- they -- the ICI categorizes funds into a range of categories and then calculates average fees for these categories of funds. What Dr. Pomerantz does is take the asset weighting of the American Century Plan -- so let's imagine there are eight -- I think there might be eight categories. And if American Century's investments were weighted equally across those eight

categories, he would weight the -- the fees in those eight categories that might run from 80 basis points to 20 basis points. He'll weight each of those categories in accordance with the assets in the American Century Plan.

And that's an attempt to correct for this problem of -- for example, one fund might invest in a lot of equities, another fund might invest in a lot of bonds or bond funds. So it's -- it's a better measure than the fund measure, but, again, as far as it goes, it doesn't go far enough to actually be a legitimate comparator. So I'll stop there because --

Q. Okay. Well, you have right here the -- the sub-bullet under additional flaws, you have broad ICI categories?

A. That's right.

Q. So it sounds like you have an issue with respect to these -- the use of these ICI categories, or at least the way Dr. Pomerantz used them?

A. Well, the -- any category of eight is going to have a lot of variation within that category. So, for example, if it's a large cap equity, there's going to be variation depending on whether that's a domestic fund or whether it happens to be a emerging market fund. The fees are going to be different. And so any time you're comparing to an average like that, it's not going to reflect the specific types of funds that in this case American Century is invested in. So there's -- there's at best kind of a band that you should be able to construct

around the number because it is based upon an average where there's a lot of still variation within a category.

Q. And so, for example, one of the categories is international; is that right?

A. That's right.

Q. And Dr. Pomerantz, he -- he sorts the American Century funds into these eight categories. And so he sorts a group of them into international, correct?

A. That's correct. Yes.

Q. And he does so in a way which mixes a variety of different -- for example, risk profile characteristics, such as capitalization, and small cap, mid cap, large cap, and style, like growth or value and so forth, sorts them all into the same bucket?

A. Yes, he does. And importantly, those different attributes will have different types of fee -- levels of fees associated with them. So he's -- he may be comparing a high fee fund in the sense that it's invested in a segment that has a strategy where you would expect a high fee against an average that includes other strategies that have lower fees.

Q. Okay. And then here, you say that the ICI fee averages include index funds. What's the problem there?

A. Well, this -- this is a problem, I think as probably folks know by now, the -- an index fund or a passive investment will tend to have lower fees, an actively managed fund will have --

tend to have higher fees, just by the nature of the services that they're providing. So when he's looking at these averages, whether they're the plan averages or the fund averages, or the fund category averages, that's a mix of active and passively managed funds. So to the extent that American Century is more heavily invested in actively managed funds than the average he's comparing to, we're going to see higher fees for American Century -- the American Century Plan than the benchmarks he's comparing to, strictly because they're more invested in actively managed funds.

And I think -- actually, in Dr. Pomerantz' testimony, he, as sort of an aside, said the difference we're looking at here is due to the underrepresentation of passively managed funds in the American Century menu, which to me it just implicates the whole analysis. If you haven't controlled for that difference, then you're not measuring excess fees. You're measuring something different. So I think that's revealing, and I would agree with his comment.

Q. Okay. And do you have any other criticisms of Dr. Pomerantz's fees analysis beyond those which are on DX 890?

A. None that I can think of as I sit here.

Q. Well, did you -- in evaluating Dr. Pomerantz's approach to fees, did you take into account participation rates -- and -- I'm sorry, take into account contributions from the company to

employee retirement accounts?

A. Well, I did sort of a benchmarking of the fee damage calculated by Dr. Pomerantz, the alleged excessive fees, to the levels of contributions or the amount of contributions made by American Century to the -- to the fund --

Q. Okay.

A. -- or the Plan, excuse me.

Q. Okay. And did you do a demonstrative on it?

A. I did.

Q. Could we have DX 808, please.

What does this show?

A. Well, this shows -- the blue bars are Dr. Pomerantz' calculation of excessive fees under his five different methods of calculating those. So the ICI Fund and ICI Plan excessive fees calculations are shown on the left there. And then he -- the three models that he also uses to calculate excessive fees, the Hewitt model, the Largest model and then the Vanguard model.

So you can see there the -- the range of excessive fees that he calculates is between 6.3 million and 22.5 million. And I compared that just to the bar on the right, which is the level of plan contributions between 2010 and 2015. So it's actually a little bit shorter period than he calculates excessive fees. But as you can see, the Plan contributions by American Century just dwarfed the alleged

excess fee damages calculated by Dr. Pomerantz.
Q. And this DX 808 is -- it's in your report, right?
A. It is.
MR. NEMSER: I move to admit it.
MR. ENGSTROM: No objection.
THE COURT: Thank you. 808 is admitted.
(Defendants' Exhibit 808 admitted in evidence.)
Q. So last section. Did you evaluate Dr. Pomerantz's assertion that the Plan suffered damages based on foregone revenue sharing?
A. Yes.
Q. And so what did Dr. Pomerantz do?
A. Dr. Pomerantz calculated a value for revenue sharing that he contends should have been available to First American -- to, excuse me, American Century that was not collected and essentially assumes that those revenue sharing dollars would have been credited to Plan participants.
Q. And did you form an opinion regarding the calculation that Dr. Pomerantz did?
A. Yes.
Q. What's your opinion?
A. Well, my -- my opinion is that there's -- there's really no basis for the underlying assumption that the -- that any revenue sharing that had been foregone, assuming there was any revenue sharing foregone, that it would have accrued to the

benefit of Plan participants. That's a -- that's contrary to practice in the industry. It's quite uncommon for revenue sharing to be credited to Plan participants' accounts. And, you know, Dr. Pomerantz chose his words very carefully, as I heard him -- appeared to choose them very carefully as he testified that those funds could be made available to Plan participants. But based upon my research, I think that's a pretty uncommon outcome and an assumption that I don't think there's any basis for.

Q. And what research are you talking about?

A. I looked at a -- I believe it was a Deloitte study that investigated this question about revenue sharing and in the case where there is revenue sharing, what happens to those dollars.

Q. And what -- what did it show in terms of the frequency of these kinds of -- of rebates to plan participants?

A. It showed that only in the neighborhood of 5 to 10 percent of plans actually receive revenue sharing and share those -- or credit those revenue sharing dollars to plan participants' accounts. It's much more common that any revenue sharing dollars are used to play -- pay for plan expenses, like, you know, audit fees or investment management services or consulting services or what have you.

Q. And Dr. Pomerantz just assumed that this plan, the American Century Plan, would behave as the 5 to 10 percent of

401(k) plans that Deloitte looked at would have behaved?

A. That's correct. That's -- that's one of those implicit assumptions that's in his calculation of revenue sharing damages, which I don't think is supported by -- by the evidence.

Q. So did he provide any reasonable basis for his assumption that he made, that foregone revenue sharing would have been rebated?

A. No.

MR. NEMSER: That's all I have, Your Honor.

THE COURT: All right. Mr. Engstrom, sir.

CROSS-EXAMINATION

BY MR. ENGSTROM:

Q. Good afternoon, Dr. Strombom.

A. Good afternoon.

Q. Dr. Strombom, have you ever served as the fiduciary of a retirement plan?

A. No.

Q. Have you ever acted as a consultant to a retirement plan?

A. No.

Q. Have you ever participated in designing the investment menu of a retirement plan?

A. No.

Q. Have you ever worked for an asset management company?

A. No.

Q. Have you ever been paid a fee to manage investments?
A. No.
Q. Have you ever authored a publication about retirement plans?
A. No.
Q. Have you ever authored a publication about asset management?
A. No.
Q. And that would include -- you haven't authored any publications relating to stable value?
A. Authored publications relate to stable value? No.
Q. Correct.
A. No.
Q. Have you ever authored a publication about the asset management industry?
A. No.
Q. Have you ever worked in the administration of a retirement plan in any capacity?
A. No. I'm an economist who does expert testimony on -- on loss causation and damages. So, no, I don't work in the investment industry.
Q. So you have no firsthand experience working with revenue sharing between a retirement plan and an investment manager?
A. You mean by working with it?
Q. In any capacity?

A. No.
Q. Do you consider yourself an expert on the topic of retirement plans?
A. Well, I'm an economist, and I have a specialization in finance. So I understand the underlying concepts, but I wouldn't call myself out as an expert on retirement plans, per se. I'm an expert on economic damages.
Q. Uh-huh. And do you consider yourself an expert in the area of asset management?
A. Again, I -- I have training as a Ph.D. with a concentration in finance, investment analysis and portfolio management. That's not, in general, what I spend my time doing. I spend my time involved primarily with damage analysis and economic loss analysis.
Q. And do you consider yourself an expert on the subject of the asset management industry?
A. No, not per se.
Q. And, Dr. Strombom, your opinion is limited to the issue of whether the plaintiffs suffered an economic loss in this case, correct?
A. I think in general, that's true. I was -- I was retained to address economic loss and damages, correct.
Q. So you're not offering an opinion regarding whether the defendants in this case breached their fiduciary duties, correct?

A. That's correct.

Q. And you're not offering any opinion regarding whether a hypothetical prudent fiduciary would have retained any of the investments in the Plan, correct?

A. I believe that's true.

Q. Because you're not a fiduciary expert, nor are you an investment expert -- oh, I'm sorry. Withdrawn.

Dr. Strombom, I'd like to start with some principles regarding the measurement of damages. So in your report, when you were discussing general principles, you quoted multiple passages from a book chapter titled "Reference Guide on Estimation of Economic Damages." Do you recall that?

A. I believe. Yes, I do recall that.

Q. Okay. So you're familiar with that source?

A. Yes.

Q. Am I correct in inferring from your citations that this is considered a learned treatise on the subject of measuring economic damages in litigation?

A. I think that specific paper has appeared in various forms. So, yes, I think it's one that's often referenced and -- both in -- in litigation, like in court opinions, and also in expert reports. So I consider it to be an authoritative source.

Q. Could we go to Exhibit PX 1109, page 1. And this is the cover of the overall book that contains that chapter. So if

we could go to page 4. And do you recognize this as being the first page of the chapter that was cited within your article?
A. I don't frankly recognize it, but it very well may be.
Q. Sure. Let's go -- start on page 11 of the exhibit.
First principle I want to talk about is the presumption of liability. And in particular, it states, In almost all cases, the damages expert proceeds on the hypothesis that the defendant committed the harmful act and that the act was unlawful.
Is that the assumption with which you proceeded in your -- in conducting your analysis?
A. Yes. I believe I'm assuming liability and proceeding to evaluate Dr. Pomerantz' method of calculating damages.
Q. The second principle I want to discuss -- if we could go to page 19. And that is regarding the necessity of comporting with existing legal authority. It states here, Assessment of damages will depend greatly on the substantive law governing the injury. The proper characterization of Copier Service's permissible conduct usually is an economic issue. However, the expert must also have legal guidance as to the proper legal framework for damages. Counsel for plaintiff may instruct plaintiff's damages expert to use a different legal framework from that of counsel for the defendant.
Dr. Strombom, would you agree with the general proposition that it's necessary to comport your analysis with

governing law in the area of inquiry?

A. Well, in my experience, there may be dispute among attorneys about what the governing law indicates. I always approach my assignments from the level of my expertise, which is in economics. So I apply economic principles that I think apply in the situation and render an opinion with respect to economics as opposed to a legal opinion or an interpretation thereof.

Q. But it's oftentimes the case, correct, where the particular tools of the economics field that you employ are governed by legal authority within a particular area, correct?

A. I don't exactly know what that question means. I mean, good economics is good economics, regardless of different legal views of -- of the case.

Q. But you cited a -- a legal opinion within your report, correct?

A. You'll have to refresh my memory about that.

Q. Didn't you, in fact, include a citation to a district court opinion from the District of Massachusetts in the case *Brotherston versus Putnam Investments*?

A. I believe I did.

Q. Okay. So then what guidance were you given by -- by defendants' counsel in this matter as to the law governing the measurement of damages in an ERISA case?

MR. NEMSER: Objection. It sounds like a request

for an attorney/expert communication.

THE COURT: Well, I mean, I'll sustain on that.

I think the witness has testified that he's applied the law of economics and -- but he doesn't -- he hasn't made any -- he's not testifying about prudence or fiduciary. He's basically attacking the economic -- economic applications of Dr. Pomerantz. So I don't think he needs to be a lawyer to testify about damages or an expert in the law. But he's not being offered in any respect in that way; is that right, Mr. Nemser? You're not offering him up as an expert to testify about prudential conduct or fiduciary conduct, right?

MR. NEMSER: No, Your Honor.

THE COURT: It's just the laws of economics. That's all you're offering him for?

MR. NEMSER: That's right, Your Honor.

MR. ENGSTROM: Yeah, Your Honor, the questions are not asking for a legal opinion. I'm simply trying to determine what his assumptions were for his analysis and what the foundation was for those, so -- but I can -- I can ask a different question.

THE COURT: I appreciate it. I appreciate it.

MR. ENGSTROM: Okay.

Q. Dr. Strombom, in developing the framework for your analysis, did you either review or rely upon any legal authority within the Eighth Circuit?

A. No. Not to my knowledge, no.
Q. Okay. And going back --
THE COURT: Did you even know you were in the Eighth Circuit?
THE WITNESS: I did. Somewhere along --
THE COURT: Okay.
THE WITNESS: -- in the engagement, I figured that out.
THE COURT: Okay.
THE WITNESS: But not right away.
Q. And going back to -- on page 440 of the article, the circled passage, do you agree with what's written in that paragraph?
A. I -- I wouldn't disagree with that, no.
Q. Now, the next underlying assumption I wanted to ask about is the mechanism for measuring damages. Would you agree that, generally speaking, setting aside the notion of how you select those comparators, that the measure of damages is a comparison between what actually happened and what would have happened had assets been in a prudently managed portfolio?
A. No. I -- I would agree with that.
Q. Okay. And would you agree with -- with this quote? Where several alternative investment strategies were equally plausible, the Court should presume that the funds would have been used in the most profitable of these. The burden of

proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of this duty?

MR. NEMSER: Objection. Calls for legal opinion.

THE COURT: Yeah. I got to back up and read that very lengthy question.

MR. ENGSTROM: I'm simply asking if that's the methodology that he followed, not for his legal opinion regarding the passage in question.

THE COURT: Well, you are asking for -- I agree. You're asking for him to talk about a burden of proof, and that's not his job. He's not proffered that. He's not -- he's not said anything about that. And that's -- that's really up to me how all this is going to work as far as burdens and burden shifting and whatnot. So that's -- I'm going to sustain the objection.

Q. So, Dr. Strombom, where there were several potential alternative investments, did you use the most profitable of those in measuring loss?

A. Well, I don't -- I included the most profitable among those in my evaluation. And so I'm not sure whether that's a yes or no to your question because I don't exactly know what you're asking me.

Q. Okay. And, in fact, you performed a peer group analysis in your original report for purposes purporting to measure performance of the American Century funds, correct?

MR. NEMSER: Objection. Beyond the scope of the direct.

THE COURT: Was that --

MR. NEMSER: I didn't say a word about peer group analysis.

THE COURT: I don't have anything in my notes that he did that in his peer -- direct. We talked about his peer group analysis.

MR. ENGSTROM: His reported deviation -- deviations from -- and decisions not to testify regarded -- relate to the -- the -- are for impeachment purposes impact his potential credibility. So simply asking about his --

THE COURT: Well, everything -- everything outside the scope of direct affects his credibility, right? I mean, that's the argument we can make if -- yeah, I'm going to sustain the objection.

Q. So --

THE COURT: If it wasn't in covered in direct. I want you to cover direct.

Q. So in the testimony that you've just offered, have you measured the performance of American Century funds against an average of peer mutual funds?

A. I don't think so.

Q. And have you offered a comparison of the performance of American Century funds to the performance of other similarly

sized retirement plans?

A. Can I have the question back again? I'm sorry.

Q. Does your testimony -- did your testimony today include a comparison of the returns of the American Century funds to the returns experienced by investors in similarly sized retirement plans in comparable investments?

A. Well, I think the second -- my use of -- I guess I'm not certain that I understand your question. I'll tell you what I did, and you -- you can help me decide if that's a yes or no to your question.

In my second model, I used Dr. Pomerantz' funds that were selected based upon their prevalence in 401(k) plans. And so that sounds like what you're asking me --

Q. Okay. And --

A. -- if I understand your question.

Q. Excuse me. And you compared the performance of the American Century funds to the worst performing of those funds identified in Dr. Pomerantz's analysis, correct?

A. Well, I -- I asked the question did the at-issue fund perform within the range of the five largest funds identified -- or the five most frequently subscribed funds that Dr. Pomerantz identified. And that -- to ask that -- answer the question was it in the range, the way you do that is -- is see if it exceeded the minimum. So that's correct. I mean, that's what I did.

THE COURT: Now, the -- the line of questions -- questioning related to did you testify today, we're all here -- I -- I'm uncomfortable with the line -- that particular type of question. Did you testify about this today. Since you were here, and I note, Mr. Engstrom, you were taking good notes and making good direction. Some of them were sustained I think maybe. So could you rephrase -- reform your question?

MR. ENGSTROM: We're moving on, Your Honor.

THE COURT: Okay. Thank you.

Q. Now, you were hired for purposes of responding to Dr. Pomerantz's report and testimony, correct?

A. Yes.

Q. So one aspect of his testimony related to the use of more expensive share classes than the lowest cost available, including a transition to R6 shares as well as a switch to institutional shares. Do you recall that testimony?

A. Yes.

Q. And so I didn't -- I understand you're not a liability expert, but I didn't hear any testimony related to that specific calculation. Can I infer from that that you do not have any dispute with the methodology used to calculating damages for that loss?

A. Well, I don't have an opinion on those damages. I -- I don't have a dispute with the calculation. I think the

question really is more a liability question.
Q. Okay. So you don't have any dispute with the -- Dr. Pomerantz's calculation that retaining the investor shares of the short-term government fund rather than the cheaper institutional shares from 2010 to 2015 cost participants about 101,000, you didn't -- that calculation was not addressed or not disputed?
A. Can I have the question back, please?
Q. I'll withdraw it.
Now, you mentioned several criticisms related to Model 1. One of the comparisons in Dr. Pomerantz's model is between the American Century Equity Index Fund and the Vanguard Institutional Index Fund. Do any of your criticisms apply to that particular measurement of damages related to that fund?
A. You know, I'd have to look at my report. I don't -- I don't remember each of the at-issue funds.
THE COURT: Do you want him to look at his report?
Q. No. There's -- you've -- have you heard testimony regarding the American Century Equity Index Fund and that it was an S&P 500 tracking fund?
A. I don't recall.
Q. Okay. And so you -- and would you agree that the Vanguard Institutional Index Fund is an S&P 500 tracking fund?
A. You're talking about the fund that was in place in the

first two and a half years of the damage period?
Q. That's correct.
A. Yeah. That's my understanding, yes.
Q. And so you don't have any criticism of either the comparator used by Dr. Pomerantz to calculate those damages or with his calculation, do you?
A. I'd have to look at my --
THE COURT: Yeah. Why don't you look at your report.
A. -- report.
THE COURT: Let's get to the bottom of this. Do you have your report handy? Why don't you look at that.
A. Do we have my report here somewhere? I don't know.
Q. Sure.
THE COURT: We just happen to have 20 copies of your report.
MS. PATHMANN: I like making copies.
THE COURT: Karla, has killed some trees before she came here today. Is there a particular page you can orient us to, Mr. Engstrom?
MR. ENGSTROM: I really don't. I was asking just a general question regarding Dr. Pomerantz's report and whether any of the criticisms applied to that comparator. So whatever the witness needs to review in order to answer the question, I'm comfortable with.

A. So based upon reviewing the Exhibit 10A and 10B, I see Dr. Pomerantz made a calculation against a single but-for alternative. And so to that extent, I think I do have a -- an issue with Dr. Pomerantz' calculation.

THE COURT: And so the record is clear, 10A and 10B are listed -- they're referenced inside of this expert report. And do we have a number for that expert -- I know it's not admitted. Do we have a number to call it? We could just call it Strombom -- Strombom expert report if we don't have a number. I'm just trying to identify it for the record. That's my only goal here.

MR. ENGSTROM: No. I agree. Should we just assign it a number? Should we call it --

THE COURT: What's your next number? Do you all have a next number?

MS. PATHMANN: Ours is PX -- oh, sorry.

THE COURT: You've used all your numbers, haven't you, Karla?

MR. ENGSTROM: We're in the 1100s now, so --

MS. PATHMANN: It would be 11 --

MR. ENGSTROM: 25?

MS. PATHMANN: -- 15.

THE COURT: Let's make sure before we give it that for our record because this would provide a lot of confusion otherwise. We'll get back to it. We'll get back to it.

Just -- we'll do our best. It's easier to get it right on the front end because --

MR. ENGSTROM: We'll call it 1115.

THE COURT: 1115. Plaintiffs' Exhibit.

Q. Because he used a single index fund?

A. Yes.

Q. Is that your -- the reason you say? And did you do an analysis of what -- of any other index funds that would have been plausible alternatives?

A. No. My methodology uses the funds that Dr. Pomerantz identified. I'm thinking within my first analysis, the analysis comparing his four models. He uses the same comparator across all of those. So it's -- but the fact is, he's using a single comparator across those. So I didn't independently attempt to identify other index funds.

Q. So was it your opinion that because he used a single comparator for that fund that participants in the Plan suffered no loss as a result of retention of the American Century Equity Index Fund as opposed to a lower cost identical index fund?

A. Can -- I'm going to have to have that question back again. I'm sorry.

THE COURT: Yeah. Could you -- could you -- I'm really, really trying to write this down too, Mr. Engstrom. And it is hard for me to follow, sir. If you could --

Q. Sure. So is it your testimony that because -- or is it your opinion that because Dr. Pomerantz used only a single comparator for -- to measure damages against the American Century Equity Index Fund that Plan participants suffered no loss as a result of retention of that fund compared to a lower cost marketplace alternative?

A. No. It's my contention that his methodology is deficient and that we can't assess damages based on the methodology that he's used.

Q. And I understand you've taken issue obviously with his comparators. But just strictly in terms of the calculations, did you believe that there were any -- do you believe that there were any computational errors within Dr. Pomerantz's report in terms of the numerical conclusions he reached?

A. Well, I'll say there -- there weren't any material errors that I would identify. We did find some calculation errors, but they -- they weren't material to my opinions.

Q. So I'd like to walk through some of the various issues you have with Dr. Pomerantz's comparators. First I'd like to talk about is his use of passive funds to measure damages for active funds. Now, you would admit that measuring -- that actively managed funds' performance is routinely measured against a benchmark index, correct?

A. It's often measured against a -- in terms of evaluating the performance of a fund manager, I think I testified that

that's something that is done and can be informative for that purpose.

Q. And aren't index funds simply a proxy for the returns experienced within a particular asset class minus a management fee?

A. They can be viewed -- they can be viewed that way. I don't think they're the appropriate index to use in calculating damages, but I know some people consider them to be that.

Q. When selecting investments within a particular asset class, would you agree that fiduciaries frequently select between a passive and an active option?

A. So within an asset class? That was the question?

Q. Right. After fiduciaries have selected that they want an investment within a particular asset class in the Plan, isn't it quite common for fiduciaries to then decide between a passive and an active option to fill that asset class?

A. To my understanding, that certainly is an option that they may consider.

Q. And, in fact, didn't you testify at your deposition that they do consider both active and passive alternatives quite often?

A. I may have testified to that. I think -- I think that's true. Which I'd just say is a different question than whether it's an appropriate comparison for calculating damages.

Q. So then you would agree that for each -- for any given active fund in the Plan, it's plausible that another fiduciary or hypothetical fiduciary would have selected a passive option?

THE COURT: Mr. -- Mr. Engstrom, you just have walked him through that he doesn't have -- he's not a fiduciary. He doesn't act as fiduciary. You just laid that foundation. And now you're asking him, I believe, to testify about fiduciary decision making. Even though he said it in the deposition, that doesn't make it pertinent here because you've just basically proved -- proved here that he's not an expert in being a fiduciary. He's denied he is. And -- but we're going into the fiduciary decision making process.

MR. ENGSTROM: Well, I believe he's offered significant testimony about how realistic it is to use -- you know, to use particular comparators. At least my interpretation of that is that he was offering opinions regarding, you know, the funds used by fiduciaries. But if I'm mistaken, I can withdraw the question.

THE COURT: Well -- here. The first part of this -- at 4:20 p.m., you started a direct examination, and you began asking -- by asking him about he's ever served as a fiduciary or consultant, if he considers himself to -- to give opinions about fiduciaries or consultants. You asked like four questions that were related to that is what I wrote down at

4:20 today.

And now we're going back asking him to opine about fiduciary decision making. And I'm -- I'm struggling with this. I know he's given -- yeah. I don't know. Mr. Nemser, do you have a problem with any of this? Maybe I'm --

MR. NEMSER: No, Your Honor. I do have a problem with it. I certainly do. He did begin -- I mean, first of all, Dr. Strombom has said he's not a fiduciary, he hasn't been a fiduciary and isn't testifying about fiduciary conduct. But these questions seem to presume a foundation based on knowledge of how fiduciaries are going to behave.

THE COURT: Well, it -- and, you know, clearly, I think if we've learned anything from this trial, there are options. There's passive options, there's active options. And I don't think you need him to testify about that. Clearly, the plaintiffs have done a good job about that, and the defense hasn't fought them on that. There's many options for fiduciaries. But I really don't think he should be testifying in that regard.

Q. Would you agree that the Committee, the Retirement Committee was primarily focused on the performance of the funds compared with underlying benchmark indices?

A. That's not an area that I investigated, the behavior of the Retirement Committee. I'm focused on Dr. Pomerantz' damage analysis and whether it's a valid economic study of

economic loss or damages. So that's not an area that I investigated.

Q. Can we go to Exhibit JX 006, page 19?

Dr. Strombom, these are Committee materials from 2010. The page I've shown here was discussed by Mr. Bouffard during this. Could you take a moment to familiarize yourself? I -- I -- did you review this particular document in preparation of your report?

A. I don't recall reviewing this. I may have seen it, but I have no recollection of it.

THE COURT: Could you give us the cover page so I can orient to this too?

MR. ENGSTROM: Sure. Can we go to 1?

THE COURT: Because it has the date of the meeting, right? This is a meeting.

MR. ENGSTROM: I believe so. It might -- it might be that cover page that just said 2010. Nope. There it is.

THE COURT: June 30th, 2010. Okay. Thank you.

MR. ENGSTROM: Now can we go to 19?

Q. Now --

A. Did you want me to -- did you want me to look --

Q. Well, I'll ask my questions, and if you have time to review it, feel free.

A. Okay.

Q. I don't know if this -- this particular exhibit indicates

that the team -- excuse me, the Retirement Committee is going to follow the Investment Team, who was changing its outlook to be benchmark oriented and peer group aware in their approach.

And my question is, if the Retirement Committee was benchmark oriented in their review of American Century funds' performance, isn't it apt to compare the performance of those funds against a benchmark --

THE COURT: Hold on.

MR. NEMSER: Objection.

Q. -- being tracked by index fund?

THE COURT: Mr. Nemser.

MR. NEMSER: Yes, Your Honor. I -- the witness has said he doesn't know whether he's even seen this document. And it's being -- the question is framed as if he knows what this document is about.

THE COURT: Here's what I'll -- here's what we're going to do. We're going to take a recess in five minutes. And, Mr. Engstrom, when you come back here, I would like you to work with shorter questions because I'm having -- I'm having trouble following all the twists and turns of these questions in this cross-examination. But let's go back to that last question that had about 14 twists and turns. Did you get all that?

THE WITNESS: No. I didn't understand the question.

THE COURT: Okay.

Q. So if the -- assuming that the Retirement Committee was benchmark focused in their measurement of funds --

A. I'm not even sure what that means, "benchmark focused."

Q. If the primary means by which the Retirement Committee was measuring performance was comparison to a benchmark index, isn't it appropriate to measure the performance of the subject funds the same way, by using a benchmark index as tracked by an index fund?

A. Not for damages purposes, I don't believe.

Q. Could we go to PX 1112?

You discussed this article in your examination with Mr. Nemser, correct? This is William Sharpe's article from 1991, "The Arithmetic of Active Management"?

A. Yes.

Q. And Mr. Sharpe is as a Nobel Prize winner, correct?

A. That's my understanding, yes.

Q. And can we go to page 2?

THE COURT: Could you blow it up? It's a little bit fuzzy.

MR. ENGSTROM: Yeah. The second to the last paragraph. Oh, I was wrong. The last paragraph.

MS. PATHMANN: Okay.

THE COURT: And this will be our last question before our recess. So please proceed.

Q. Okay. It states, The best way to measure a manager's

performance is to compare his or her return with that of a comparable passive alternative. The latter -- often termed a benchmark or normal portfolio -- should be a feasible alternative identified in advance of the period over which performance is measured. Only when this type of measurement is in place can an active manager (or one who hires active managers) know whether he or she is in the minority of those who have beaten viable passive alternatives.

Dr. Strombom, do you agree with Professor Sharpe's opinion relating to measurement of active managers as stated here?

A. I think I testified on direct that I -- I don't dispute Dr. Sharpe's opinion that is stated here. And -- but I did say that I don't think it's an appropriate measure. And it's a different question as to how one should measure damages and against what alternatives one should measure damages in a case like this.

THE COURT: We're getting ready to take a recess unless you got one --

MR. ENGSTROM: I've got one last --

THE COURT: -- short --

MR. ENGSTROM: One last question just relating --

THE COURT: Short question.

MR. ENGSTROM: It's a short question. Yeah.

THE COURT: All right.

MR. ENGSTROM: Relating to this document.

Could you -- could we zoom out and go to the first page? Could we zoom in on that paragraph that I circled, Karla?

Q. And here, Professor Sharpe states, Because active and passive returns are equal before cost, and because active managers bear greater costs, it follows that the after-cost return from active management must be lower than that from passive management.

Would you agree with that?

A. I don't really know the context for this assertion that because active and passive returns are equal before costs -- I mean, that's not the case in every instance. I'm not sure if he's talking about based on his research on average or -- because clearly, some active managers' returns before cost are in excess of passive returns. So I don't know the context of this.

MR. ENGSTROM: I'll give you a chance to review it, and we can talk about it on Thursday.

THE COURT: All right. We'll see you Thursday. All right. Everybody work hard to be prepared for our last day of trial on Thursday. Okay. Thank you.

(Proceedings concluded at 5:00 p.m.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/Regina A. Lambrecht
REGINA A. LAMBRECHT, RDR, CRR
Official Court Reporter

October 4, 2018
DATE